BLANK

PAGE

BLANK

PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	4
Statement	4
Summary of Argument	8
Argument:	
I. The property the value of which the Secretary excluded from the rate base was not used and useful in the rendition of stockyard services	18
A. Exclusion of the value of the property used for transportation purposes or as transportation facilities	20
B. Exclusion of the value of the stock show property	34
II. The Secretary properly refused to make a separate additional allowance for going concern value over and above the amount therefor which was included in the itemized property appraisal embraced within the rate base	54
Appellant's evidence does not warrant a separate allowance for going concern value	57
The Secretary's total valuation amply allows for the element of going concern value	65
The decided cases clearly establish that no separate additional allowance for going concern is required in this case	73
III. The maximum rates and charges prescribed by the Secretary on livestock resold or reweighed for purpose of sale are lawful and are sustained by the evidence	83
IV. The Secretary's determination of the fair value of appellant's land which is used and useful in the rendition of stockyard services is amply supported by the evidence	100
V. The maximum rates and charges prescribed by the Secretary include an adequate allowance for all reasonable expenses incurred by appellant	106
A. The allowance for dues, donations and subscriptions is adequately supported by the evidence	109
B. The allowance for expense of hearings under the Packers and Stockyards Act is adequately supported by the evidence	112

Argument—Continued. Page

VI. The rates fixed by the Secretary are sufficient to yield a fair return on the fair value of the used and useful property in addition to all reasonable stockyard operating expenses 115

A. The rate of return of 6½% which the Secretary used in determining reasonable rates is reasonable and is amply supported by the evidence 116

B. The rates prescribed by the Secretary, if applied to the volume actually received subsequent to the test period would have yielded an amount sufficient to cover all reasonable operating expenses and a fair return upon the fair value of appellant's used and useful property 124

Conclusion 126
Appendix A 127
Appendix B 131
Appendix C 132
Appendix D 133
Appendix E 135
Appendix F 137

CITATIONS

Cases:

Acker v. *United States*, 298 U. S. 426 119
Adams v. *Mills*, 286 U. S. 397 27
Allied Packers v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641 25
A., T. & S. F. Ry. Co. v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92 ..... 11, 27
Atchison Ry. v. *United States*, 295 U. S. 193 ..... 27, 28, 31, 32
Bluefield Co. v. *Pub. Serv. Comm.*, 262 U. S. 679 122
Cedar Rapids Gas Co. v. *Cedar Rapids*, 223 U. S. 655 ..... 64, 74
Chicago Live Stock Exchange v. *Atchison, Topeka & Santa Fe Railway Company*, 52 I. C. C. 209 27
Chicago Live Stock Exchange v. *Atchison, Topeka & Santa Fe Railway Company*, 58 I. C. C. 164 27
City of Winona v. *Wisconsin-Minnesota Light & P. Co.*, 276 Fed. 996 114
Columbus Gas & Fuel Co. v. *City of Columbus*, 17 F. (2d) 630 ..... 114, 115
Columbus Gas Co. v. *Comm'n*, 292 U. S. 398 80
Covington Stock-Yards Co. v. *Keith*, 139 U. S. 128 ..... 11, 26
Dayton P. & L. Co. v. *Comm'n*, 292 U. S. 290 ..... 80, 123
Denver v. *Denver Union Water Co.*, 246 U. S. 178 82
Denver Union Stock Yard Co. v. *United States*, 57 F. (2d) 735 ..... 109, 110

Cases—Continued. Page

Des Moines Gas Co. v. *Des Moines*, 238 U. S. 153 ..... 64, 75
Dimmitt-Caudle-Smith Live Stock Commission Co. v. *C., B. & Q. R. R. Co.*, 47 I. C. C. 287 ..... 25, 27
Ex parte Poresky, 290 U. S. 30 108
Galveston Elec. Co. v. *Galveston*, 258 U. S. 388 ..... 60, 61, 64
Hall v. *Geiger-Jones Co.*, 242 U. S. 539 108
Houston v. *Southwestern Tel. Co.*, 259 U. S. 318 18
I. C. C. v. *Los Angeles*, 280 U. S. 52 33
Lindheimer v. *Illinois Tel. Co.*, 292 U. S. 151 123
Livestock Loaded and Unloaded at Chicago, 213 I. C. C. 330 ..... 12, 27, 28, 31
Los Angeles Gas & Electric Corp. v. *R. R. Comm'n*, 289 U. S. 287 ..... 18, 64, 77, 108, 122
Morgan v. *United States*, 298 U. S. 468 119
New York & Queens Gas Co. v. *Newton*, 269 Fed. 277 114
Nor. Pac. Ry. v. *North Dakota*, 236 U. S. 585 108
Reno Power, Light & Water Co. v. *Public Service Comm'n*, 298 Fed. 790 ..... 111, 114
R. R. Comm. v. *Southern Pac. Co.*, 264 U. S. 331 33
St. Joseph Stock Yards Co. v. *United States*, 11 F. Supp. 322 ..... 95, 102, 110
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 ..... 15, 16, 18, 48, 56, 74, 87, 88, 95, 102, 105, 110, 119, 123
So. Pac. Terminal Co. v. *Int. Comm. Comm.*, 219 U. S. 498 24
Spielman Motor Co. v. *Dodge*, 295 U. S. 89 108
Strauss & Adler v. *New York C. R. Co.*, 153 I. C. C. 609 28
Tagg Bros. & Moorhead v. *United States*, 29 F. (2d) 750 98
Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420 99
The Minnesota Rate Cases, 230 U. S. 352 ..... 16, 72
Union Stock Yards Co. of Omaha v. *United States*, 9 F. Supp. 864 ..... 15, 87, 94, 102, 110
United Gas Co. v. *R. R. Comm'n*, 278 U. S. 300 108
United States v. *Union Stockyard*, 226 U. S. 286 ..... 11, 27
Wabash Valley Elec. Co. v. *Young*, 287 U. S. 488 122
Western & Atlantic v. *Public Comm.*, 267 U. S. 493 33
West Ohio Gas Co. v. *Comm'n*, 294 U. S. 63 ..... 46, 114
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19 64

Statutes:

Commerce Court Act, June 18, 1910, C. 309, Sec. 1, 36 Stat. 539, Sec. 45 U. S. C. Title 28 2
Interstate Commerce Act, Feb. 28, 1920, c. 91, Secs. 402, 418, 41 Stat. 474–486; Secs. 1 (22), 15 (5), U. S. C. Title 49 ..... 11, 24, 25, 28, 33
Packers and Stockyards Act, 1921, c. 64, Secs. 301–408, 42 Stat. 159; Secs. 201–229, U. S. C. Title 7 ..... 1, 2, 4, 11, 19, 23, 24, 27, 28, 38, 53, 113
Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 208, 219; Secs. 41 (28), 345 (4), 47, U. S. C. Title 28 2

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 798

THE DENVER UNION STOCK YARD COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINION BELOW

The opinion of the District Court of the United States for the District of Colorado (R. 1263) is reported in 21 F. Supp. 83.

JURISDICTION

The decree of the District Court was entered on December 20, 1937 (R. 1256). Petition for appeal was filed January 18, 1938, and was allowed on January 20, 1938 (R. 1259). The jurisdiction of this Court rests upon Section 316 of the Packers and

Stockyards Act, 1921, c. 64, 42 Stat. 159, 168 (U. S. C., Title 7, Sec. 217). By this section the provisions of law relating to the enjoining and setting aside of orders of the Interstate Commerce Commission are made applicable to orders of the Secretary of Agriculture entered under authority of the Packers and Stockyards Act.

Judicial review of the orders of the Interstate Commerce Commission was originally provided for by Section 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, commonly known as the Commerce Court Act, which conferred jurisdiction upon the Commerce Court over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (U. S. C., Tit. 28, Secs. 41 (28), 47), transferred the jurisdiction of the Commerce Court to the several District Courts of the United States, and provided that all suits to suspend or set aside an order of the Interstate Commerce Commission should be heard by three judges. Provision was made by the Urgent Deficiencies Act for direct appeal to this Court (U. S. C., Tit. 28, Secs. 47, 345 (4)).

QUESTIONS PRESENTED

1. Whether the railroad rights of way, the loading and unloading facilities, chutes, chute pens and alleys, and the land on which they are located are used and useful in the rendition of stockyard services, and whether the action of the Secretary in

excluding the value of such property from the rate base was lawful (appellant's brief, pp. 55–66; *infra* pp. 20–34).

2. Whether the stock-show property is used and useful in the rendition of stockyard services and whether the action of the Secretary in excluding the value of such property from the rate base was lawful (appellant's brief, pp. 31–54; *infra* pp. 34–54).

3. Whether a sufficient allowance has been made by the Secretary for going concern value (appellant's brief, pp. 12–30; *infra* pp. 54–83).

4. Whether the evidence sustains the finding of the Secretary that the appellant's practice of giving free service to yard traders is unjustly discriminatory (appellant's brief, pp. 67–84; *infra* pp. 83–100).

5. Whether the evidence supports the Secretary's valuation of the land of appellant which was used and useful for stockyard purposes (appellant's brief, pp. 93–96; *infra* pp. 100–106).

6. Whether the prescribed rates include an adequate allowance for dues, donations, and subscriptions (appellant's brief, pp. 85–89; *infra* pp. 106–112).

7. Whether the prescribed rates include an adequate allowance for expenses of hearings under the Packers and Stockyards Act (appellant's brief, pp. 89–93; *infra* pp. 112–115).

8. Whether the return of 6½% employed as a rate factor by the Secretary is reasonable and substantiated by the evidence (appellant's brief, pp. 96–101; *infra* pp. 115–124).

9. Whether the rates prescribed by the Secretary, if applied to the volume actually received subsequent to the test period, would have yielded an amount sufficient to cover all reasonable expenses plus a fair return upon the fair value of appellant's used and useful property (*infra* pp. 124–126).

STATUTE INVOLVED

The pertinent portions of the Packers and Stockyards Act, 1921, are set forth in Appendix A to this brief (*infra* pp. 127–130).

STATEMENT

Appellant is a corporation engaged in the operation of a stockyard which renders services as defined in the Packers and Stockyards Act, 1921. Its stockyard is located in the city of Denver, Colorado. On November 8, 1934, the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness and lawfulness of the rates and charges of appellant's stockyard (R. 3–4). Pursuant to the notice a hearing at Denver, Colorado, before an examiner designated by the Secretary was commenced on June 3, 1935, and concluded on July 3, 1935 (R. 4).

Testimony was taken with respect to all questions pertinent to the determination of fair and reason-

able rates. Appellant and the government introduced in evidence 118 exhibits containing 4,000 pages, including land appraisals, reports of engineers as to structural values, etc., studies of depreciation of appellant's structures and other documentary material. On October 28, 1936, a tentative report was served on the appellant (R. 5). The appellant filed exceptions to this tentative report. On January 7, 1937, pursuant to the request contained in these exceptions, the respective counsel presented oral arguments before Harry L. Brown, Acting Secretary of Agriculture (R. 5). On February 17, 1937, Harry L. Brown as Acting Secretary of Agriculture issued his "Findings, Conclusion and Order" (R. 229–352).

On March 9, 1937, appellant commenced this suit by the filing of a petition in the District Court of the United States for the District of Colorado to enjoin the enforcement of the order of February 17, 1937 (R. 1–22). The petition contained the customary prayer for convoking a three-judge court and asked for an interlocutory injunction and a permanent injunction against the enforcement of the order (R. 20).

An interlocutory injunction was granted by the District Court on March 9, 1937, enjoining the enforcement of the rates and charges prescribed by the Secretary pending the disposition of the case in that court. The appellant was required to furnish an adequate bond to assure refunds to the shippers of livestock if the order is upheld (R.

353). On June 22 and 23, 1937, the cause then proceeded on final hearing before a statutory three-judge court sitting as the District Court for the District of Colorado (R. 1256). On October 8, 1937, the District Court rendered its opinion (R. 1263–1276), and on December 20, 1937, entered its findings of fact and conclusions of law (R. 1248–1256) upholding the order of the Secretary and rejecting all of appellant's contentions. By its decree the court dissolved the interlocutory injunction (R. 1257), but upon motion of appellant and agreement of the government this provision of the decree was stayed for a period of thirty days subsequent to December 20, 1937 (R. 1262–1263). In its order allowing an appeal the District Court further provided that the interlocutory injunction should continue in full force and effect until the final determination of the appeal by the Supreme Court of the United States (R. 1259).

At the hearing before the District Court there was introduced in evidence an abstract of the record of the 1935 hearing before the Secretary and the voluminous exhibits. It was provided by stipulation that the exhibits introduced in the District Court should be transmitted to this Court as original exhibits and that they should not be printed (R. 1306).

The relative yield of the prescribed rates compared with the rates existing when the order was entered is shown in detail in Appendix E of this brief (*infra* pp. 135–136). In this appendix an

application has been made of the prescribed rates and the existing rates (described therein as "Rates under Investigation") to the volume of livestock used by the Secretary as a rate factor. It appears that, as applied to the volume used by the Secretary as a rate factor, the old rates would have produced $579,342 revenue and the prescribed rates would have produced $530,117, thus effecting a reduction of $49,225 annually. In terms of percentages the prescribed rates would produce 91.5% of the revenue produced by the old rates. Thus the reduction amounts to 8.5%.

It should also be noted at this point that as applied to the business of the year 1935 the prescribed rates would have produced a net operating income of 6.10% of the fair value of appellant's property as determined by the Secretary, and that as applied to the business of the year 1936 the prescribed rates would have produced a net operating income of 6.74% of such fair value. The matter of the return which the rates would have yielded in the years 1935 and 1936 is amplified in Point VI (*infra* pp. 124–126).

The pertinent facts in this case are stated in the findings of the District Court (R. 1248–1254). Inasmuch as most of the issues on this appeal require discussion of the facts in connection with the argument, it would unnecessarily prolong this brief to undertake at this point to make a further separate factual statement. Accordingly, further recital of the facts will be left to the portions of the brief devoted to argument.

SUMMARY OF ARGUMENT

This case presents to the Court the ordinary issues of valuation and fair return in a stockyard rate controversy. The issues are whether the valuation of appellant's property, upon which the Secretary of Agriculture has based the maximum rates described in his order, is constitutionally sufficient, and whether those rates, in view of the volume of business to be anticipated, and after the deduction of proper charges for operating income, will yield to appellant a constitutionally adequate return on the value of its property.

The Secretary found and employed as the basis of his order a value of $2,792,700 for appellant's property used and useful in the rendition of stockyard services. In spite of the fact that many of appellant's structures were built many years ago when labor and materials were considerably less expensive than at the present time, the Secretary used as the basis of his valuation reproduction cost unmodified by any considerations of original or historical cost. The Secretary's development of the rate base proceeded as follows: On the basis of the evidence before him the Secretary determined that the total cost of reproduction new of appellant's used and useful property, including overheads, was $2,530,201. To this figure the Secretary added $2,283 as a net addition on account of an inventory correction in the water and sewer systems, bringing the total to $2,532,484. The Secretary also found that the evidence demonstrated that a condition per

cent of 80.545 was proper in this case. Applying the condition per cent of 80.545 to $2,532,484, the Secretary found the total cost of reproduction new, less depreciation, to be $2,039,789. Adding to this $536,825, which figure represents the Secretary's valuation of the land which he found to be used and useful, plus $30,267 to cover one year's interest on the used and useful land during the construction period, and $139,300 as an allowance for working capital, the Secretary reached a figure of $2,746,181. Further additions in the amount of $22,500 for a bridge and $24,000 for a sewage disposal plant brought the total fair value of appellant's property to $2,792,681.

Appellant claims that the Secretary improperly excluded from the rate base as not used and useful the value of certain railroad trackage, loading and unloading docks, chutes, and chute pens, together with the value of the land upon which these facilities are located, and that therefore the rate base should be increased by $177,108, the value of this property as contended by appellant. Appellant also claims that the Secretary improperly excluded from the rate base as not used and useful the so-called "stock-show property." It contends that $219,033 should be added to the rate base as the value of the land and structures of this property.

Appellant further claims that the rate base should be increased $325,000 as a separate additional allowance for going concern value. The Sec-

retary contends that a liberal allowance for going concern value has been included in the valuation of those items employed to compose the rate base and that therefore no separate additional allowance is necessary. Appellant claims that the Secretary's finding that approximately one-half the prescribed charge on sales by producers is the proper charge to be imposed on yard traders was an improper invasion of the functions of management and that it was confiscatory and discriminatory. The Secretary contends that this charge was effected to prevent discrimination and an unequal burden on those using the facilities of the yard. The remainder of appellant's contentions as to the inadequacy of the Secretary's rates to yield a fair return revolve about estimates of land valuation, exclusions of certain expense items, and a discussion of the rate of return found to be proper and its application to the volume of business reasonably to be anticipated. These questions are developed in detail in the portions of the argument devoted to that purpose.

In view of the fact that the record fully sustains the Secretary's order upon any theory of judicial review, the question of the scope of judicial review is not separately considered in this case. A more detailed summary of the government's position on the principal questions presented follows:

I. The Property the Value of which was Excluded by the Secretary from the Rate Base was not Used and Useful in the Rendition of Stockyard Services

A. Exclusion of the value of property used for transportation facilities

It is conceded by appellant that the controversy on this point is largely academic and that no issue of confiscation arises or exists. This is true because the income from this property, which was also excluded, was more than adequate to earn a fair return on the fair value of this property. Apart from this, however, the Secretary's exclusion from the rate base of 8.985 acres of land upon which these transportation facilities are located was proper. The trackage is leased from appellant by several railroad companies and the services relating to the loading and unloading of livestock are performed by appellant in accordance with a contract between it and these companies. The transportation itself and the connected services of loading and unloading are not "stockyard services" as defined in Section 301 (b) of the Packers and Stockyards Act but are a part of transportation under Section 15 (5) of the Interstate Commerce Act. *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 133; *United States* v. *Union Stockyard,* 226 U. S. 286; *A. T. & S. F. Ry. Co.* v.

Kansas City Stock Yards Co., 33 I. C. C. 92; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330. The ownership of this property as applied to transportation is immaterial. The test is the function for which the property is used. The statutes and cases referred to definitely establish that this property is indispensable to the proper prosecution of transportation. It is equally clear that the services performed are employed in aid of this function and are not stockyard services. For these reasons the Secretary properly excluded the value of this property from the rate base.

B. The Secretary's exclusion of the value of the stock-show property, consisting of 2.633 acres of land and structures located thereon, was proper because this property is not utilized in the rendition of stockyard services

Appellant's entire argument is built upon the educational and advertising effect of the stock show. This is no indication that the property is used in rendering stockyard services, which is clearly demonstrated by virtue of the fact that the livestock consigned to the market for purposes of sale never goes near the stock-show property. Moreover, the stock show is conducted by the Western Stock Show Association which is separate and distinct from appellant and which conducts

an entirely different business that is separately managed. It is also of importance to note that the show is carried on during only eight days of the entire year. Appellant's contention that the Secretary has included income which it alleges to be attributable to the stock show is unwarranted by the evidence. Whatever revenue is derived in the main stockyard during the period of the show is *stockyard,* not stock-show, revenue. The business from which it is derived *is not handled on property which has been excluded from the rate base* but is performed in the yards.

II. THE SECRETARY PROPERLY REFUSED TO MAKE A SEPARATE ADDITIONAL ALLOWANCE FOR GOING CONCERN VALUE OVER AND ABOVE THE AMOUNT THEREFOR WHICH WAS INCLUDED IN THE ITEMIZED PROPERTY APPRAISAL EMBRACED WITHIN THE RATE BASE

The Secretary's valuation includes a substantial amount for going concern value which is inextricably interwoven with other values employed on the basis that the stockyard business was established and operating successfully. The liberality of the Secretary in using reproduction cost as the measure of structural value without giving consideration to other factors such as original cost is obvious in this case. Other instances of liberality, such as the addition of construction and general

56431—38——2

overheads in the amount of 40.17 per cent of the cost of labor and material, clearly leave in the rate base an unlabeled margin adequate to cover the going concern element.

The Secretary refused to make a separate additional allowance for going concern value and we submit that none was required in this case. It is our belief that the decisions of this Court establish the proposition that rate regulatory bodies are not required to make separate allowances in rate bases for going concern value over and above recognition and consideration for that factor in other valuations, particularly where that separate allowance is based upon mere speculative and theoretical conjecture. The inclusion of a separate allowance is not required unless the evidence clearly demonstrates that by reason of an inadequate valuation the result is confiscatory. No such evidence exists in the instant case.

III. The Maximum Rates and Charges Prescribed by the Secretary on Livestock Resold or Reweighed for Purpose of Sale Are Lawful and Are Sustained by the Evidence

The Secretary found that the appellant had not been assessing a "yardage charge against traders' livestock" resold or reweighed for purposes of sale except that resold in the commission division. As a result, he prescribed a schedule of rates to be

charged against such resold or reweighed livestock at substantially one-half the regular yardage charge. The Secretary found as a fact that a substantial portion of appellant's yards was being used by these yard traders. He also found that appellant's policy of allowing the traders the use of yard facilities without charge was unjustly discriminatory to those who were charged for such use. The evidence sustains these findings of the Secretary and clearly reflects the reasonableness of the maximum rates required by his order. Conditions at the Denver stockyard with respect to arrangements for yard traders, their relationships to producers and others, are not substantially different from those at other stockyards where charges for livestock resold or reweighed for purposes of sale are imposed upon yard traders. Similar charges were sustained in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, and *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864. There is no merit in appellant's contention that these charges imposed upon yard traders will be passed on by them to the producers. Even if the contention were true, the considerations requiring the charge would still prevail. The contention made by appellant that the imposition of these charges will operate to drive the yard traders from the market is entirely conjectural. Such a result has not followed at other markets where similar charges have been imposed.

IV. The Secretary's Determination of the Fair Value of Appellant's Land Which Is Used and Useful in the Rendition of Stockyard Services Is Amply Supported by the Evidence

The Secretary found that the total value of appellant's land which is used and useful in the rendition of stockyard services is $536,825. In doing so the Secretary adopted the valuation placed upon the land by the government's valuation engineer, Mr. Zelinski, whose qualifications have been approved by this Court in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 58.

Mr. Zelinski gave consideration to the topography, size, and shape of appellant's land and its location with respect to the railroads and packing plants to which its business is intimately related. He also gave weight to available city facilities.

It is apparent from a review of the evidence that appellant's appraisers committed substantially the same error as was condemned in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 59–60, when they took into consideration the so-called "stockyards" value of the property instead of the fair average market value and thus violated the rule established in *The Minnesota Rate Cases,* 230 U. S. 352.

V. The Maximum Rates and Charges Prescribed by the Secretary Include an Adequate Allowance for all Reasonable Expenses Incurred by Appellant

The Secretary found that the reasonable expenses, exclusive of return on investment, which

should be covered by the rates amount to $346,545. Appellant challenges the sufficiency of this allowance with respect to (1) the annual allowance of $325 for dues, donations, and subscriptions, and (2) the annual allowance of $1,200 for the cost of hearings under the Packers and Stockyards Act.

The Secretary allowed only such contributions as were of peculiar benefit to appellant's employees and patrons. It was his belief that other contributions should not be covered into the rates. The Secretary and the District Court were of the opinion that $1,200 as an annual allowance on account of hearings under the Packers and Stockyards Act was sufficient in view of the infrequency of such proceedings.

VI. The Rates Fixed By the Secretary Are Sufficient to Yield a Fair Return on the Fair Value of the Used and Useful Property in Addition to All Reasonable Stockyard Operating Expenses

The Secretary in arriving at the schedule of maximum rates which he prescribed as reasonable used a rate of return of 6½ per cent. We submit that in employing this rate factor to arrive at the schedule of rates which he prescribed he acted reasonably and fairly. Substantial evidence in the record so demonstrates and supports his action. The rates arrived at in this manner and prescribed as reasonable by the Secretary were subsequently applied to the actual business re-

ceived by appellant during the years 1935 and 1936. They would have produced, according to stipulation, a return of 6.10 per cent in 1935 on the fair value of appellant's property used and useful in rendering stockyard services and a similar return of 6.74 per cent in 1936, or an average return for these two years of 6.42 per cent of the rate base as determined by the Secretary. It is submitted that rates which produce this return are not confiscatory in view of the fact that, as shown by the record, conservative investors have to be content with returns considerably less than 6.42 per cent.

ARGUMENT

I

THE PROPERTY THE VALUE OF WHICH THE SECRETARY EXCLUDED FROM THE RATE BASE WAS NOT USED AND USEFUL IN THE RENDITION OF STOCKYARD SERVICES

The Secretary found that 46.779 acres of appellant's 130.57 acres of land and the structures located thereon were not used and useful in the rendition of stockyard services (R. 271). The value of this excluded land and structures could not therefore be included in the rate base. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 57; *Los Angeles Gas & Electric Corp.* v. *R. R. Comm'n,* 289 U. S. 287, 311; *Houston* v. *Southwestern Tel. Co.,* 259 U. S. 318, 324.

Appellant has excepted to the exclusion from the rate base of the value of the land and structures leased to a group of railroads for use in rendering transportation services, and to the exclusion of the value of the land and structures owned by appellant and used by it in performing its contract with the railroads for the loading and unloading of livestock. Neither the property leased by the railroads nor that owned and used by appellant in connection with the loading and unloading of livestock by appellant for the railroads for compensation can be considered as used and useful stockyard property. The land and structures used by the railroads and those used in connection with loading and unloading of livestock are not employed in the rendition of stockyard services as defined in Section 301 (b) of the Packers and Stockyards Act as "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock."

Appellant has also excepted to the exclusion from the rate base of the value of certain land and structures known as the stock-show property. This property was excluded by the Secretary on the ground that it was not used and useful in the rendition of stockyard services as defined in Section 301 (b) of the Packers and Stockyards Act.

The aforesaid exclusions will be separately considered.

A. Exclusion of the value of the property used for transportation purposes or as transportation facilities

With respect to the Secretary's exclusion of the railroad land and trackage and of the land and facilities used for loading and unloading, it is conceded by appellant that only an academic controversy exists and that the action of the Secretary in this instance is not confiscatory (appellant's brief, p. 60).[1]

Valuing this property on the basis of fair value as found by the Secretary it appears that appellant is earning approximately 10% on the fair value of such property. The only effect of including in the rate base property bearing a high rate of return and including the income from such property would be to indicate that rates lower than those prescribed by the Secretary might be justified.[2]

---

[1] Appellant has said in its brief at page 60:

> The Secretary excluded from income and expense accounts of appellant all income and expense received or incurred in connection with the trackage. This is proper if the facility is to be excluded. As a matter of fact, the question is somewhat academic because that income is sufficient to return a fair rate upon the investment. It is to be noted that we do not in this instance allege that the action of the Secretary is confiscatory.

[2] The railroad property and the loading and unloading facilities may be valued in exactly the same way as appellant's other property. The fair value of the land occupied by these facilities is shown by the order (order, paragraphs 83–115; R. 277–297) and totals $54,337. The total reproduction new cost of the structures is shown by the record to

Although the point is an academic one, as appellant concedes, the merits will nevertheless be discussed.

The findings of the Secretary relating to loading and unloading facilities are set out in Finding No. 40 (R. 245). Government witness Christensen, on cross-examination, described the so-called "chute alleys" as follows (R. 413):

> * * * they are two parallel alleys, one serving the loading and unloading pens and then a parallel alley serving the stockyard pens parallel to the chute alleys. On Government Exhibit No. 8 the brown line covers a dotted line which represents the fences between the chute alleys and the stockyard alley, the latter serving the stockyard pens and the former serving the unloading chute pens. Yes, the fence is broken all along with gates.

---

be $182,040 (Gov. Ex. 28, pp. S-2, S-6, S-8). Taking the reproduction new cost less depreciation (Gov. Ex. 28, pp. S-2, S-6, S-8), the present value of the structures is $143,497. The total fair value of the property is the sum of the fair value of the land plus the fair value of the structures, or $197,834. The average yearly net income from this part of appellant's business may also be computed from the record. The various sums for making up the gross income from this source are shown in Government Exhibit 38, pages 84, 96, 97, 100, 113. The various items of expense may be computed from Government Exhibit 38, pages 127, 128, 136, 137, 160, 163, 164, 171, 174, 175, 176, 234, 237, 243, 244, 263, and by making certain necessary computations and adjustments for depreciation, taxes, etc., it is possible to determine the total expense. The difference between the gross income and the total expense represents the net income.

The following table shows the result of the computations:

When the livestock are let through these gates on their way to the pens for loading, their transportation is begun; when they are let through these gates on their way from the pens into which they have been unloaded, their transportation is ended. The line of the fence broken with these gates is the boundary of the area excluded by the Secretary and is the only possible line of physical demarcation between transportation and stockyard functions (R. 245). Witness Christensen on direct examination testified, referring to the map which is Government Exhibit No. 8 (R. 391):

> Units 32, 33, 34, and 35, and the chute alleys are comparable to what might be termed railroad depot facilities. They consist of the railroad loading and unloading docks and chute alleys which are adjacent to the

---

Annual average gross income (1930–1934)	$66,771.73
Annual average total expense (1930–1934)	46,212.69
Annual average net operating income (1930–1934)	20,559.04
Total fair value of railroad and loading and unloading properties	197,834.00
Annual average rate of return—Percent	10.39

Appellant may contend that the profit on all "straw bales" sold by the stockyard company for the purpose of bedding cars should be allocated to the railroad property and loading and unloading facilities. While we do not have the exact figures for the years 1930–1934, it has been stipulated that the annual average profit from this source for 1935–1936 was $5,046. If we assume that this figure represents the annual average profit from bedding sold in the years 1930–1934, it then becomes necessary to increase the annual average net income by $5,046, making a total of $25,605.04. On this basis the annual average rate of return is increased to 12.94%.

> railroad docks. They are facilities and services furnished by the Stock Yard Company, used for loading and unloading and receiving and delivering by the railroads of livestock at the stockyards, consisting of the property commonly known as the C. B. & Q. Dock, the U. P. Dock, C. & S. or Quarantine Dock and the River Dock, including platforms, chute pens, and chute alleys providing means of necessary ingress and egress to and from said docks which serve the transportation facilities hereinbefore referred to. Without these docks and chute alleys and the loading and unloading services employed by the railroad companies, they could not receive for shipment or effect delivery of livestock at the stockyards.

All of these facilities are used by appellant in performing its contract with the railroads for loading and unloading livestock. The railroads pay appellant on a per car basis for performing this service (Gov. Ex. 5, p. 136). The charges are absorbed by the railroads or included in the freight rates. The Secretary has not assumed jurisdiction over such charges.

In the face of the decisions, later to be discussed, in which it has been held that loading and unloading facilities and services are part of transportation, appellant argues (appellant's brief, pp. 57–58) that, determining the character of facilities and services by their "use," the loading and unloading activities are "stockyard services" and not transportation services. The argument is based on the words of Section 301 (b) of the Act, defining such

services as "furnished at a stockyard in connection with * * * [handling] in commerce of livestock." The argument in effect is that all activities involving the use of any facilities at the Denver stockyard in connection with "commerce of livestock" are stockyard and not transportation services and that the facilities employed are stockyard and not transportation facilities (appellant's brief, p. 58).

Appellant in thus seeking to extend the jurisdiction of the Secretary ignores the fact that his jurisdiction is limited not only by the Packers and Stockyards Act but by the Interstate Commerce Act. Regulation of transportation services and jurisdiction over facilities used in rendering such services are expressly reserved to the Interstate Commerce Commission.

It is clear that not only the side tracks but the loading and unloading docks, pens, chutes, and alleys are transportation facilities as distinguished from stockyard facilities, and that all of the 8.985 acres were properly excluded by the Secretary as not "used and useful" in reference to "stockyard services or facilities furnished at a stockyard" (Packers and Stockyards Act, Sec. 301 (b)).

Our position in this respect is supported by a long line of authorities.

In *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498, this Court said, referring to the Interstate Commerce Act (pp. 522–523):

> The reasoning of the Commission is justified by the statute. It includes in the term

> "railroad" " all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

See also *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641 (1930).

In *Dimmitt-Caudle-Smith Live Stock Commission Co.* v. *C. B. & Q. R. R. Co.*, 47 I. C. C. 287 (1917), the Interstate Commerce Commission declared (at p. 318):

> * * * the transportation of live stock does not terminate *until after the stock has been unloaded into suitable pens. Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; *United States* v. *Union Stock Yards Company*, 226 U. S. 286; *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 99. *The duty to unload stock into suitable pens includes the duty to provide such facilities and the means of reaching them, or else to hire those owned by others.* [Italics supplied.]

Section 15 (5) of the Interstate Commerce Act (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484; 49 U. S. C. sec. 15 (5)) provides in part:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

Prior to the enactment of the above section, this Court had said in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 133:

> The railroad company, holding itself out as a carrier of livestock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving livestock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned.

Accordingly, it was held in that case (p. 136):

> The transportation of livestock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be

> delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

That the furnishing of facilities for loading and unloading livestock transported is a part of the transportation service was also held by this Court in *United States* v. *Union Stockyard,* 226 U. S. 286; *Adams* v. *Mills,* 286 U. S. 397, 410; *Atchison Ry.* v. *United States,* 295 U. S. 193. The Interstate Commerce Commission has many times held to the same effect. *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.,* 33 I. C. C. 92 (1915); *Dimmitt-Caudle-Smith Live Stock Commission Co.* v. *C. B. & Q. R. R. Co.,* 47 I. C. C. 287, 318 (1917); *Chicago Live Stock Exchange* v. *Atchison, Topeka & Santa Fe Railway Company,* 52 I. C. C. 209 (1919); *Chicago Live Stock Exchange* v. *Atchison, Topeka & Santa Fe Railway Company,* 58 I. C. C. 164 (1920); *Livestock Loaded and Unloaded at Chicago,* 213 I. C. C. 330 (1935).

The line thus established as the dividing line between stockyard and transportation services has been retained under the Packers and Stockyards Act and has been maintained by the Interstate Commerce Commission and by this Court in determining the respective jurisdiction of the Interstate Commerce Commission and of the Secretary of Agriculture under the Packers and Stockyards Act. Section 406 (a) of the Packers and Stockyards Act provides:

> Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

The Interstate Commerce Commission in *Strauss & Adler* v. *New York C. R. Co.*, 153 I. C. C. 609, 619 (1929), expressly rejected the contention that under the Packers and Stockyards Act jurisdiction of service charges for unloading and reloading livestock was in the Department of Agriculture, holding that unloading and reloading were included in "transportation." In *Atchison Ry.* v. *United States*, 295 U. S. 193, 201, this Court, in holding invalid a yardage charge sought to be imposed by a stockyard company on livestock of which delivery was taken by consignees at unloading pens, said (referring to Section 15 (5) of the Interstate Commerce Act and to the Packers and Stockyards Act, particularly Section 406 (a)):

> The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is a place where transportation ends.

In *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, the Interstate Commerce Commission had before it the application of the Chicago Stock Yards Company for cancellation of tariffs filed with the Commission. The Chicago Stock

Yards Company owns railroad facilities which are leased to railroads and performs unloading services in the handling of livestock on a contract basis with the railroads in exactly the same way as does the Denver Union Stock Yards Company. The tariffs which it was seeking to cancel were for the loading and unloading services. The stockyard company urged the cancellation on the grounds that the services were not transportation services but were part of the stockyard services under the jurisdiction of the Secretary of Agriculture. The Interstate Commerce Commission rejected this contention and denied the application, saying (213 I. C. C. 330 at 340):

> The services performed and facilities furnished by respondent were, at the time of the decision in the *Union Stock Yards case,* an inseparable part of the railroad transportation. And now this has been rendered more than ever true by the declaration in section 15 (5) of the act, the transportation wholly by railroad shall include delivery at public stockyards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments, without extra charge to the shipper. While, doubtless, the emphasis of the amendment is laid on the making of no extra charge, its purpose of obtaining that result is secured by declaring that the transportation by railroad shall include such service. We do not think that a

harmonious construction of the statute results from, on the one hand, an indisputable jurisdiction over the prescribed delivery into suitable pens, the same having to be treated as an inseparable part of the rail transportation to be furnished by the railroads without separate charge, and, on the other hand, the assumption that we are without jurisdiction over respondent in performing such part of the transportation and its charges therefor, which must be included in the line-haul rate. The Packers and Stockyards Act, August 15, 1921, expressly provides that nothing therein shall affect our jurisdiction or confer upon the Secretary of Agriculture concurrent jurisdiction over any matter within our jurisdiction. It is plain that Congress did not intend a neutral zone of no jurisdiction over respondent's charges and it is equally plain from the statement above quoted from *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* that jurisdiction over respondent's charges to "the place where transportation ends" was left with us.

It is immaterial whether the property utilized for transportation facilities and services is owned by the carrier itself or is leased by the carrier. Likewise, it is immaterial whether the services of unloading and loading are performed by the carrier's employees or by appellant's employees as they are at the Denver yards. Thus, in *Livestock*

Loaded and Unloaded at Chicago, 213 I. C. C. 330, 338, the Interstate Commerce Commission declared concerning unloading and loading which was done by respondent stockyard company under a contractual arrangement with carriers:

> * * * the fact that such service is performed by respondent would not sever the service from the transportation by railroad. * * * The fact that the railroads must proffer the service as part of their interstate railroad transportation, absorbing any charge exacted therefor, is inescapable.

Appellant bases its argument that because the land in question is owned by the stockyards company and not by any of the railroads furnishing transportation facilities the land should not be excluded from the rate base (appellant's brief, p. 60) upon an erroneous interpretation of the decision of this Court in the *Hygrade* case (*Atchison Ry.* v. *United States,* 295 U. S. 193) and of the decision of the Interstate Commerce Commission in *Livestock Loaded and Unloaded at Chicago,* 213 I. C. C. 330. In these cases this Court and the Commission concluded that unloading of livestock into pens at the Chicago stockyard was a transportation service to be performed by carriers without extra charge to shippers or consignees, and that unloading and loading at that yard were transportation services for which the Union Stock Yard & Transit Company was required, as a common carrier, to publish and have on file with the Com-

mission schedules of its tariffs for those services. Appellant contends that both decisions were based upon the peculiar facts of the Chicago stockyard situation, particularly the terms of the corporate charter of the stockyard company and the inter-corporate relations by which that company was a subsidiary of a holding company along with a railroad carrier. However, in *Atchison Ry.* v. *United States,* 295 U. S. 193, none of these facts was referred to by this Court. Furthermore, it is clear that the Commission reached its decision independently of the special facts mentioned above.

Therefore, appellant's assertion (appellant's brief, p. 60) that it never has represented itself as a common carrier is irrelevant. Moreover, appellant's argument shows that appellant obviously has confused the question of whether or not the Union Stock Yard & Transit Company in Chicago was a "common carrier" subject to the jurisdiction of the Interstate Commerce Commission with the question of what is and what is not included in the service of transportation. These questions are entirely distinct.

It is beside the point to argue, as appellant does (appellant's brief, p. 59), that the Interstate Commerce Commission does not have power to order the construction of spur tracks "located or to be located wholly within one State." Neither can the Interstate Commerce Commission order the construction of passenger depots, and yet these, it is

established, are inseparably component parts of interstate passenger transportation. *I. C. C.* v. *Los Angeles,* 280 U. S. 52, 70. As has been pointed out in *Western & Atlantic* v. *Public Comm.,* 267 U. S. 493, 497, the lack of power of the Interstate Commerce Commission to order the construction of spur or side tracks "wholly within one State" is because of the statutory prohibition in the Transportation Act of February 28, 1920, Section 402 (41 Stat. 474, 49 U. S. C., Sec. 1 (22)), under which positive compulsion by order, as in the case of passenger depots (*R. R. Comm.* v. *Southern Pac. Co.,* 264 U. S. 331, 345), is left to state agencies.

Appellant owns a system of railroad tracks which lie within the confines of its stockyard and the land on which these tracks have been laid. It owns no locomotives or other transportation equipment, but leases these tracks to a group of railroads under a joint agreement (R. 884; Gov. Ex. 5, p. 15; Respondent's Ex. 21).

These railroad facilities, all of which lie within the confines of appellant's yards and none outside (R. 884), constitute a web of switch tracks used by the railroads for shunting cars of livestock to and from the loading and unloading facilities and to and from the various packing and industrial plants adjacent to the yards. If the loading and unloading of livestock is a transportation service, as this Court has held, then of necessity the hauling by train of the livestock up to these loading and unloading facilities must be a transportation serv-

ice and the land and tracks used in accomplishing it are transportation facilities.

B. Exclusion of the value of the stock-show property

The Secretary has excluded from the rate base certain property and the structures located thereon designated as the stock-show property. This property is part of Zone 9. The Secretary found that 4.448 acres of land in Zone 9 and the structures located thereon devoted to the horse and cattle division were used and useful in the rendition of stockyard services (R. 267, 268, 271). The stock-show property, the value of which the Secretary excluded from the rate base, consists of 2.633 acres of land on which are located a club and store building, a stadium, a sales pavilion, a stadium heating plant, a stock-show restaurant, a stock-show hog barn, and a stock-show wash house (R. 269, 271). The Secretary's findings respecting this property are set forth in paragraphs 68 to 71 and paragraph 75 of his order (R. 264–269, 271). The Secretary ascertained the value of the excluded land as $40,143 (R. 296) and the value of the structures as $204,372 on an appraisal of their reproduction cost new at $253,737 (R. 299, 300) with a deduction for depreciation on the basis of a condition per cent of 80.545 (R. 304). The total value of the land and structures as depreciated therefore is $244,515.

This property, which is used by the Western

Stock Show Association, a non-profit corporation, to conduct a stock show for eight days in January of each year, is rented by the Association from the appellant (Gov. Ex. 5, pp. 445–447).

How appellant acquired all of the stock-show property is not too clear from the record. It appears that in 1906 appellant started a stock show which at first was held in tents and temporary structures (R. 831). Steps were taken to provide permanent buildings and to see that the show became an annual event. In 1908, appellant built the stadium (R. 831, 1039). After attempting to operate the show appellant found the burden onerous and conceived the idea of promoting a new corporation to take over the work. The Western Stock Show Association was organized on the theory that it would be able to inspire the necessary public subscription required to finance the show and that prospective subscribers would not think that the contributions were for the benefit of appellant (R. 842, 970, 1040, 1041). The Association has no stock (R. 970), but membership in it was originally sold as a means of procuring money for the operation of the show, thus relieving appellant of that expense. Appellant's assistant general manager frankly admitted that this was "a clever move" on its part to free itself of certain burdens incident to the operation of the stock show (R. 205, 970).

The Association has a board of directors which consists of 39 members and which includes officers

of the stockyard, of the packing plants, of the Denver banks, and of railroad companies, producers of all kinds of livestock, and others (R. 842). The new Association built a stock pavilion with money solicited from the business people of Denver and afterward built a tile barn with excess revenue, constructing both the pavilion and the barn upon vacant land owned by appellant. Whether appellant leased the vacant land to the Association is not clear from the record, but it is clear that the Association was originally considered as having title to the pavilion. It also appears that the Association was considered as having title to the tile barn (R. 971). Just how the appellant acquired title to these properties is not indicated. Appellant's witness, Pexton, stated (R. 971):

> Two or three years later [after the building of the tile barn] they had a deficit of some $23,000 which the Stock Yard Company had to pay. We then took title to the barn. Because of rent they have not paid in the past we feel that the sales pavilion is ours, and we feel the same way about the tile barn.

This explanation does not seem very satisfactory from a legal as well as a business point of view, but appellant's present relationship to the Association seems to be that of lessor-lessee. Appellant annually leases the entire stock-show property to the Association for 75% of the net revenue of the show not to exceed $7,000. A contract

executed between the two corporations fixes their legal relations with respect to the property (Gov. Ex. 5, pp. 545–547). Appellant is performing a function no different in renting its property to the Association than when it rents this same property to the West Side Athletic Club for the purpose of staging athletic contests (see Gov. Ex. 5 pp. 450–452). The business carried on in either instance is the business of renting certain property to outside enterprises. This is not a "stockyard service" and the Secretary refused to consider it as such.

It is manifest for two principal reasons that the Secretary was required under the Packers and Stockyards Act to exclude this property from the rate base: (1) the property is not used by appellant but by another corporation which is separate and distinct from appellant and which conducts an entirely different and separately managed business and (2) this property is not used to render stockyard service.

Little more need be said on the point that the stock show is not an integral part of appellant's business. It is apparent that it was not so regarded by appellant or its operation would not have been unloaded on a separate corporation. The stock show evidently was turned over by appellant to a separate corporation in order to rid itself of an onerous burden and to give control of the stock show to a greater extent to the community, im-

portant portions of which, like packing companies and their personnel, were as much interested in the show as the appellant. Consequently, even if the conduct of a stock show could be regarded as the rendition of stockyard services incident to the operation of a stockyard so as to fall within the regulatory jurisdiction of the Secretary under the Packers and Stockyards Act, that jurisdiction could not be exercised upon the appellant in reference to the stock-show project but would have to be imposed upon the Western Stock Show Association.

Entirely apart, however, from any question as to who is performing the functions of a stock-show enterprise, in the final analysis it is a test not so much of who performs the function as it is of *what function is performed.* Whether the Denver Union Stock Yard Company operates the stock show or whether that function is performed by the Association does not alter the fact that running a stock show is not performing a "stockyard service," defined in Section 301 (b) of the Act as "services or facilities furnished by a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock."

The shipper sending livestock to the Denver market as a general rule consigns it to commission men at appellant's stockyard. He does not

expect his livestock to use any part of the stock-show property. It is indisputable that livestock consigned to the market for purposes of sale *never reaches the stock-show property.* The only livestock which does reach the stock-show property is the fancy show stock which is brought there for exhibition purposes during the show week. It seems apparent that the exhibition of prize stock during one week of the entire year is as foreign to the marketing of the shipper's livestock consigned directly to the yards as is the maintenance of a veterinary college or agricultural school whose function it is to give advice which benefits the livestock industry.

Witness Christensen, a resident of Denver and a field assistant to the chief of the Packers and Stockyards Division, Bureau of Animal Industry of the Department of Agriculture, stated that he had been constantly engaged over a period of 16 years in supervising and extensively studying livestock markets and facilities at Denver, St. Joseph, Kansas City, East St. Louis, Omaha, Sioux City, Cleveland, and Wichita (R. 383–385). In speaking of the stock-show property and facilities, this witness stated that in his opinion they were not used and useful in the rendition of stockyard services (R. 393). He further stated (R. 395):

> These facilities were not designed as a market place, for which purpose they would be superfluous and would not have been provided. They are used primarily by the

> Western Stock Show Association for exhibition purposes and neither that company or any of its concessionaires are within the jurisdiction of the Packers and Stockyards Act or render stockyard services. When the facilities are not used by the Stock Show Association, some of them are used for yarding horses, but this is more than offset by the fact that practically all of the horse and mule division is vacated and utilized by the Stock Show Association during the Stock Show period. Occasionally the stadium is leased for athletic events but none of the facilities enumerated above is ever used in the rendition of stockyard services. In my opinion, and it is my understanding, that none of these units aid or facilitate or are necessary to the respondent in the rendition of stockyard services.

This witness further explained his position in this connection when he stated (R. 397–398):

> Throughout my direct examination I have stated that certain properties, in my opinion, did not aid or facilitate and are not necessary to the respondent in the rendition of stockyard services. I have tried to classify and allocate the facility in accordance with the definition of the word "stockyard" in Section 302 of the Packers and Stockyards Act and in accordance with the definition of the term "stockyard services" in Section 301 (b) of the Act. I do not contend that a corporation engaged in operating a stockyard may not also engage in

> other lines of business and own property and render public or private services not within the jurisdiction of the Packers and Stockyards Act, *but my thought is that used and useful* facilities and services are those *reasonably necessary in the rendition of stockyard services as defined in the Act and reasonably necessary for continuation of stockyard services for a reasonable period.* [Italics supplied.]

The fact that the buildings located on the stadium property stand idle during fifty-one weeks of the year [3] is persuasive evidence that these properties do not subserve a stockyard purpose. That the District Court was fully cognizant of this fact is demonstrated by its opinion wherein it is stated (21 F. Supp. 83, 87; R. 1268):

> Attention is also called to the fact that the show lasts for a week only and the lessee, the Western Stock Show Association, does not pretend to furnish any stockyard facilities. But even if it is a stockyard facility, *it is not available to patrons during the remaining 51 weeks of the year,* and a very small proportion of the livestock handled uses these buildings even during the week of the show. [Italics supplied.]

And in Finding 10 of its Findings of Fact and Conclusions of Law the court stated (R. 1252):

---

[3] Except at such times as they are leased to persons for various purposes foreign to the stockyard industry, such as athletic contests, etc.

> The so-called stock show property is unused except at such times as when it is under lease to the Western Stock Show Association or to other parties. The Secretary does not regulate the charges imposed by petitioner for the use of this property. *The only time at which the property is used in connection with livestock is during the one week each year that the Western Stock Show Association is occupying the premises and conducting the stock show.* The Western Stock Show Association does not pretend to furnish any stockyard facilities in connection with the handling of this livestock and the Secretary does not attempt to regulate the charges made in connection with the stock show. [Italics supplied.]

Apparently it is appellant's contention, from the great amount of testimony referred to in its brief (R. 685, 686, 794, 800, 940, 832, 834), that the promotion of the stock show is the performance of a stockyard service to shippers of livestock by bringing prize breeds of high quality stock to the show, by stimulating the interest of stock growers in producing a better quality of livestock, and by inducing buyers of such blooded stock to attend the show. Assuming that all this is accomplished, it merely indicates the *educational and advertising value* of the show. Conjectural advertising and educational values are not "stockyard services" within the contemplation of the Act. There may be some basis for considering a part of the cost of the

show as an advertising expense which warrants some contribution by appellant to the cost,[4] but it offers no basis for concluding that the stock-show property is used and useful in rendering stockyard services to shippers who consign their livestock to the yard.

Appellant places much emphasis on testimony to the effect that the holding of a stock show has greatly benefited the livestock industry generally (appellant's brief, pp. 35–42), but this proves nothing beyond that fact. It does not show that the stock-show activities are stockyard services, for the same effects could be produced by other means, as, for example, by the publicizing of printed information on the breeding, raising, and marketing of livestock, or by providing short courses on these subjects similar to those afforded by agricultural colleges. Yet it is not to be supposed that appellant would contend that such activities would be stockyard services under the Packers and Stockyards Act. It is difficult, therefore, to regard as constituting persuasive argument to this effect either appellant's statement (appellant's brief, p. 43) that "Boys' and Girls' Club livestock (4–H

[4] That it does make such a contribution in the form of services rendered without compensation is amply supported by the evidence. Appellant's officers render certain services to the Stock Show Association, some of its employees keep the Association's books, and others do certain work during the progress of the show. The expense incident to this work has been allowed to remain in appellant's stockyard expense account (R. 267).

Clubs) with registered pure-bred cattle, calves, sheep, hogs, and horses are exhibited in the structures in controversy (R. 967)", or appellant's citation that "The Department of Agriculture is spending considerable sums of money in an effort to induce cattlemen to raise a better grade of cattle" (appellant's brief, p. 46).

The stock show is an enterprise which ordinarily must be subsidized. Persons receiving benefits should bear the burdens of that subsidy. This class doubtless includes some of the patrons of the Denver Stock Yard Company, but these patrons who participate in the advantage of the show as exhibitors or visitors during the stock-show week constitute a very small percentage of those who pay rates for stockyard services. In this connection the Secretary, in commenting upon the great emphasis placed by appellant on the fact that the stock show had resulted in benefit to the industry as a whole, stated (R. 266–267):

> * * * this is beside the point. The matter to be determined is whether or not respondent, who is a zealous member of the Stock Show Association (which assesses entrance fees, grants concessions for a consideration, and solicits contributions from various Denver businesses) should absorb deficits which occur in connection with the show *and pass those deficits on to all those who use the regular facilities of the yards.* [Italics supplied.]

It is manifestly unfair to tax the patrons of the Denver market for the cost of educating producers in general in the art of raising better livestock. The District Court found (Finding 11, R. 1252) that "Whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole" and in its opinion stated (21 F. Supp. 83, 87; R. 1267):

> There is considerable evidence that the show is a benefit to the industry as a whole, *as distinguished from the Denver yards in particular,* and tends to improve herds and to advertise Denver as a good cattle market. [Italics supplied.]

It follows that the assumption that it is the responsibility of the appellant to underwrite all deficits incurred by the Stock Show Association is to pass on to the patrons of the Denver market in the form of regular stockyard rates a financial burden which in justice they ought not to pay.[5] If

---

[5] Appellant states "that it is fair, reasonable and just for all livestock producers, *including those who do not attend the Show*, to pay their part of the costs thereof through rates because of the benefits received as members of the industry". [Italics supplied.] It further states that two producer witnesses, Mr. Mitchell and Mr. Farr, had so testified, and that "*there is no contrary testimony.*" [Italics supplied.] (Appellant's brief, p. 45.) The error of such an assertion is reflected in the testimony of another of appellant's witnesses, whose opinion was not proffered by appellant. At page 696 of the record Mr. Pace stated:

> Yes, it is natural to believe that there would be some patrons of the Denver yards who wouldn't show at the

appellant is seeking some allowance for the stock show on the ground that the stock show is a philanthropic enterprise for the benefit of the livestock industry, it should ask that such allowance be included in the allotment for contributions. Appellant has already made a substantial contribution (*supra,* footnote 4, p. 43). If it is appellant's contention that the stock show increases the stockyard business, then it should request that a reasonable allowance be made for advertising expense as a charge against its income.[6] But neither of these arguments is persuasive for including the value of this property in the rate base as used and useful stockyard property necessary in rendering the services which a shipper purchases when he pays the stockyard rates.

Appellant points to the decision handed down by the District Court for the District of Colorado in 1932, 57 F. (2d) 735, 750, and quotes from the opinion to the effect that the business of appellant is entirely dependent upon the livestock busi-

---

Stock Show and who don't come to the Stock Show to either buy or sell, but then it is largely attended by people who do come for that purpose. No, I don't know the attendance nor the number who patronize the Denver yards by either buying or selling.

It is my understanding that if he does not come here and if he does not patronize the Show nor buy any cattle, he wouldn't have anything to pay. [Italics supplied.]

[6] Advertising or developmental expenses to foster normal growth are legitimate charges upon income for rate purposes if confined within the limits of reason. *West Ohio Gas. Co. v. Comm'n,* 294 U. S. 63, 72.

ness and that if that business perishes the appellant will perish, and if that business flourishes the appellant will flourish. From this premise appellant apparently concludes that the exclusion of the stock-show property and its structures from the rate base will cause its stockyard business to perish. We submit that this is gross exaggeration and a patent *non sequitur*.[7] In the first place, the livestock industry in all its varied activity is one thing; the *stockyards* business is another—it is but a branch of the whole. The Secretary is not attempting in this proceeding to regulate the *entire livestock industry*.[8] The legitimate scope of his regulation extends only to the *stockyard business*. Only the stockyard rates have been charged as unreasonable and in connection with stockyard rates alone is a change sought to be effected. It is therefore incumbent upon the Secretary to include as used and useful only such property and struc-

[7] The experience of other markets demonstrates that a stock show is not an essential part of the stockyard business. St. Joseph, Sioux City, St. Louis, St. Paul, Cincinnati, Indianapolis, Cleveland, Jersey City, Buffalo, and Pittsburgh have no shows comparable to the one held in Denver (R. 966).

[8] The Secretary has not attempted to regulate the stock-show charges or to determine the reasonableness of its rates, including admission charges, charges to concessionaires, entry fees to exhibitors, etc., or of its expenses, including premiums, judges' fees, advertising, rental, etc. The Western Stock Show Association does not purport to render stockyard service; if it did it would have to file tariffs with the Secretary of Agriculture, which it has not done.

tures as are embraced within the ambit of that business, *and that business alone.*

If the intimation of the appellant is that because the stock-show property and structures have been excluded it necessarily follows that the stock show will perish and with it the stockyard business, we submit that such a deduction is wholly unwarranted. And the only pertinent reply we can make is that there is not a scintilla of evidence in the record to substantiate such a view.

In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, this Court, in considering the exclusion of a commercial hotel known as the Transit House, pointed out that special benefit to a few did not justify an annual levy on all patrons of the yards which would be occasioned by the inclusion of the Transit House within the rate base. At page 57 of the opinion this Court said:

> The District Court held that it would have to be shown very clearly that the business of the yards would be materially affected by the absence of a nearby hotel before it could be said that its maintenance was so related to the stockyards business as to be properly included in fixing the rate for yard services. The court said there was no such showing. We take the same view.

We submit that appellants have failed to show that simply because a collateral activity to the stockyard business bestows an advertising and

educational benefit upon the *livestock inaustry as a whole* it follows that its curtailment will result in serious impairment to the *stockyard business of appellant.*

In commenting upon the exclusion of the stock-show property, the District Court said (21 F. Supp. 83, 87; R. 1268):

> * * * hence we are not justified in overruling the Secretary, especially where, as in this instance, a stock show is not an indispensable facility and its exclusion does not affect the value of the property as an integrated and established enterprise. *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U. S. 287.

Appellant further contends that the Secretary has assumed an anomalous position by excluding the stock-show property from the rate base and at the same time including what they allege to be income and expense *attributable* to that property. That this is a strained construction of the Secretary's order and a misconception on the part of the appellant is apparent from a reasonable inspection. First of all the Secretary has taken care to exclude all income fairly attributable to the leasing of property for the purpose of the show. The rental derived from the lease has not been included (Gov. Ex. 41, p. 2); neither have the expenses incurred incident to the services rendered by appellant's employees in connection with the show (R. 267). This raises the question whether there is any other income which should be credited to the show.

Appellant claims there is and points to its Exhibit 13 which indicates the excess earnings of the month of January over the average of the earnings of December and February for the period 1930–1935, inclusive. Appellant also cites the excess earnings of January 1936 over those of December 1935 and February 1936; and the excess earnings for the last two weeks of January 1937 over the average of the earnings for the last two weeks of December 1936, the first two weeks of January 1937 and the first two weeks of February 1937 (appellant's Exs. J and R). On this showing appellant grounds its contention that the excess earnings are derived because of the stock show. This contention necessarily proceeds on the theory that were it not for the stock show these increased receipts, realized in January, would not otherwise accrue to the stockyard company later. That this is a highly speculative and optimistic assertion is adequately demonstrated by the evidence. In the first place, appellant failed completely to adduce any evidence to substantiate its assumptions. Its own witness, Mr. Pace, demonstrated the high degree of speculation indulged in by appellant when he stated on cross-examination (R. 695–696):

> It is a pretty hard question to say how many cattle come into the Denver yards on account of the Stock Show *that would not otherwise come.* I couldn't tell you as to how many or anything of that kind, but we

> think that the receipts are very largely increased, but as to the amount, I wouldn't want to say. [Italics supplied.]

In this connection Mr. Bufkin, senior accountant for the Packers and Stockyards Division and an auditor in many rate investigations (R. 545), indicated (R. 577) that if it were the contention of appellant that the increased income derived during the period of the show would not otherwise accrue to the Denver market, it was incumbent upon it to prove such an assertion by its computations. This, we submit, appellant has failed to do in spite of the conclusions drawn by its witnesses. Appellant claims the conclusions are supported by "cogent reasons," but the record does not so demonstrate. It seems only fair to conclude that at best the show acts as an accelerating factor in stimulating increased activity during the period of its operation—activity which, were the show discontinued, would doubtless be distributed more evenly throughout the normal trading periods, cutting off the January peak and leveling out price fluctuations. One of appellant's own witnesses, Mr. Mitchell, definitely indicated that the practice is to hold stock in abeyance until the time of the show when he stated (R. 800):

> Yes, to my knowledge livestock is held off the market for the Show. I hold my stock off year after year waiting for the Stock Show week to come.

At page 805 of the record this witness stated:

> Yes, every year I hold back livestock for the Denver show, but I have shipments on the Denver market pretty near every week.

The action of this shipper is typical of a good many others. Is it reasonable to conclude from this that if it were not for the stock show the increased receipts of January would never accrue to the Denver market? It is more consonant with reason to conclude that it is the natural thing for shippers to withhold their cattle until show week when they can accompany them to Denver, deposit them at the yards, and then attend the show. It is their fiesta week, one of the get-together times (R. 695) when rodeos, exhibitions of prize stock, and other forms of attraction are offered for the public at large. Were it not for the show, receipts for January would in all probability be lighter. Such a concession, however, is certainly no reason for claiming that this regularly shipped stock would not come to the yards at a later time during the normal trading periods. No doubt the prize stock would not come to Denver, but with that we are not concerned. That type of animal is exhibited as a high quality breeder, and such of it as is sold is auctioned off at the show at prices in excess of the usual sales prices (R. 801, 802).

This is a function quite different from the services performed at the stockyard in connection with the stock consigned to that yard by its patrons for

sale. The evidence demonstrates that a high degree of speculation was indulged in by appellant's arrogating to the stock show the receipts *handled at the yard.* The testimony quoted or described by appellant (appellant's brief, pp. 50–52) fails to show any increase in *annual receipts* because of the stock show. It establishes only the fact that receipts are greater for January, when the show is held, than in December or February, subnormal trading periods. The important factor is that all of this volume of business is *regular stockyard trade* handled in the usual manner in the stockyard proper, paying the regular stockyard rates, and sold by commission men as other livestock is sold. *None of this business is handled on the property which has been excluded from the rate base.* Consequently, the income derived by virtue of the services performed *in the yards* is a *stockyard* revenue and is not, as appellant claims, stock-show revenue.

For these reasons the stock-show property is not part of appellant's stockyard facilities nor is it utilized in the furnishing of stockyard services within the meaning of Section 301 (b) of the Packers and Stockyards Act: (1) livestock consigned to the market for the purposes of sale never goes near the stock-show property; (2) whatever educational or advertising value the show has to offer is no indication that it is performing a stockyard service; (3) the Secretary is fixing stockyard rates, not rates for the entire livestock industry; and (4)

whatever increased revenue is derived during the period of the show is *stockyard,* not stock-show, revenue. Appellant has also failed to prove that this stockyard revenue would not accrue to the Denver market during the normal trading periods were it not for the acceleration offered by the show.

It is our contention that the Secretary, from a consideration of all the evidence adduced in this connection, properly excluded the value of this property from the rate base.

II

The Secretary Properly Refused to Make a Separate Additional Allowance for Going Concern Value Over and Above the Amount Therefor Which Was Included in the Itemized Property Appraisal Embraced Within the Rate Base

In arriving at the fair value of appellant's property, which is used and useful in rendering stockyard services, the Secretary stated (R. 311):

> In adopting the cost of reproduction new less depreciation of structures and the value of land, as heretofore found with respect to structures, equipment, and land, consideration has been given to the element of going concern value. Adequate allowance for the element of going concern value has been included, although no separate item on its account has been set forth.

The District Court, noting that no separate allowance was made for going concern value, reviewed

the valuation process followed by the Secretary and found that his valuation represented the total fair rate base upon which appellant is entitled to earn a fair return. The finding of the District Court on this point is as follows (R. 1252–1253):

> No separate allowance is made for going concern value, but an allowance for going concern value is included in the total rate base upon which petitioner is permitted to earn a reasonable return. In addition the rate base includes among others such items as allowances for proximity to highways and railroads; freedom from floods; access to water supply and other city services; favorable location in regard to related industries; and the effect of the city zoning ordinance; its availability for a stockyard and as an assembled tract as distinguished from several tracts in separate ownership. Also included is construction overheads, general overheads, and 5% in addition for omissions and contingencies, omitting, however, organization expenses. Consideration was given to the peculiar climatic conditions of Denver as affecting rot, rust, and decay; $30,267 was added to cover interest on used and useful land during the construction period and $139,300 added for working capital. The result arrived at is the sum of $2,792,700 as a fair rate base upon which petitioner is entitled to earn a fair return.

In its opinion the court pointed out that the rate base as determined by the Secretary includes a complete recognition of going concern value and

that appellant failed to offer convincing proof of error (R. 1271). The substance of appellant's complaint is that the Denver Union Stock Yards Company has a going concern value of not less than $325,000, and that the Secretary's failure to make a separate allowance for this item results in confiscation (appellant's brief, p. 28).

The Secretary was fully cognizant that appellant is a going concern with an established business, an operating organization, connected customers, and in a position to earn a fair return under reasonable rates (R. 309). The Secretary's detailed findings with respect to going concern value are set forth in his order (R. 309–312). It is clear from a reading of this portion of the order that the Secretary very carefully considered all the evidence adduced in this connection and treated the element of going concern value in exactly the same manner as it was treated in valuing the St. Joseph stockyards. See *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38. Although the Secretary expressly rejected the contention that a separate allowance of at least $325,547 should be added to the rate base for going concern value (R. 310), he adopted a valuation of the property as a whole which was predicated on the fact that the business was established and in successful operation (R. 311). As this Court remarked in the *St. Joseph* case, "he thought that in the rate base he had fixed there was an adequate allowance for that element and that it

was 'inextricably interwoven with other values' " (298 U. S. 38, 64).

Appellant's evidence does not warrant a separate allowance for going concern value

Appellant asserts that no allowance for going concern value was included in the rate base as determined by the Secretary. This contention, appellant states, is based upon convincing proof of going concern value requiring a separate allowance of not less than $325,000 (appellant's brief, p. 28). The evidence supporting this claim, it asserts, may be found summarized in paragraphs numbered 1 to 5, inclusive, at pages 24 to 28 of appellant's brief. Referring to those paragraphs, we find that in paragraph "1. *The nature of appellant's business* * * * the fact that appellant has been successful in creating and establishing a market with a strong buying demand" is advanced as proof of going concern value. In paragraph "2. *Cash outlays and other grants and expenditures in building the market,*" expenditures and grants of land and cash totaling $325,547.10 as gifts to railroads and packing houses are advanced as proof of the amount of going concern value. In paragraph "3. *Sale-in-Transit and Sorting Privileges,*" appellant points to special railroad rate privileges it has obtained for certain of its customers and cites the expenses incurred as a result of having to defend and maintain these privileges. In paragraph "4.

Increased percentage of sales to receipts," the strength and value of the Denver market is reiterated as reflected in the percentage of sales to receipts. In paragraph "5. *Hyder's estimate,"* the conclusion of appellant's valuation engineer that the going concern value of appellant's plant may be determined by multiplying $10.00 by the number representing the average annual carload receipts of livestock at the market, is set forth as justifying a separate allowance of $350,000.

In so far as appellant contends that going concern value actually exists in its plant, we are in complete accord. The Secretary recognized the fact and reached a fair value on that basis. Obviously, the contentions of appellant as set out in the paragraphs relating to the nature of its business and the increased percentage of sales to receipts are no more than attempted proof that the Secretary *correctly* concluded that the plant does have going concern value.

The paragraph relating to sale-in-transit and sorting privileges has no relation whatever to this discussion. Such a contention gives no clue as to the existence or amount of going concern value. If this "privilege" is of special value to appellant, it is because the Interstate Commerce Commission has granted a *discriminatory* privilege to appellant. Appellant does not question the fact that the Secretary by including $3,600 as annual expenses for Interstate Commerce Commission hearings in

his estimate of annual expenses has made adequate allowance for the cost of obtaining such privileges (R. 324).

The substance of appellant's claim that it is entitled to have included separately in the rate base not less than $325,000 for going concern value is contained in the two paragraphs which indicate that $325,547.10 has been contributed to railroads and packers and that appellant's valuation expert included in his appraisal $350,000 as a separate allowance. An analysis of this evidence will show that it offers no basis for computing going concern value.

Appellant avoids going so far as to claim that its developmental costs, consisting of gifts to attract packers and railroads, are the absolute measure of going concern value but insists that such expenditures are "indicative" and "corroborative" proof (appellant's brief, p. 29). In connection with these inducements to packers and railroads to locate near the stockyard property Mr. Pexton, the assistant general manager of the appellant, testified that the cost of the land donated in this way had been $254,589.38. To this he added carrying costs up to the date of the grants. The original cost plus carrying charges amounted at the date of the grants to $325,547.10 (appellant's Ex. 15; R. 847–856).

The payment of subsidies bears neither a logical nor a legal relation to the existence of going concern value. It is even doubtful that such gifts have

benefited appellant to any appreciable extent. The court below stated in its opinion (R. 1271):

> The benefits, if any, of such largesse are speculative and have not been identified. Nor are they part of that element of value that pertains to an assembled and established plant doing business and earning money as defined in the Des Moines Gas Company case, 238 U. S. (supra). The well deserved success that plaintiff has enjoyed is not the result of such artificial stimuli, but rather to efficient management and financing and the advantages that Denver and the surrounding territory offer to an enterprise of this kind.

Appellant's argument assumes that the donations have augmented its success. Obviously, this is not a necessary consequence of such donations. The amount of the donations may not affect in any way the success of the company. On the other hand, an assumption that these donations did contribute to ultimate success furnishes no sound basis for computing a separate allowance for the going concern element. *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388, 394. Neither is it proper to use such a measure on the basis of *a priori* reasoning—the result is to include in the rate base theoretical values which have no foundation in fact.

Such a theory is just a slightly revised version of the "past deficit" method for computing going

concern value by attempting to capitalize past losses. The gifts to attract packers and railroads are closely analogous to past deficits. This Court in *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388, declared that past losses and inadequate returns can not be taken as a basis for present valuation, saying (p. 395):

> The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise, or of errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 14.

By the same token past donations to other industries cannot be used to erect a rate base. *Going concern value cannot be measured by what one gives away.*

Of even a more speculative character is the testimony of appellant's valuation expert. Mr. Hyder

testified at length upon the subject of going concern value (R. 1090–1103). He named as elements of going value to be considered over and above the value of the land, structural improvements, and working capital (R. 1127) the following: (1) an established business dating from 1886 and showing in a broad way a very favorable developm..t, with substantial stability in volume (R. 1098); (2) an efficient organization, consisting of a permanent and qualified executive and personnel (R. 1098); and (3) substantial expenditures in developing the market (R. 1099, 1125). With respect to the value to be attributed to these elements of going concern, Mr. Hyder stated (R. 1127):

> In my opinion, $350,000 is a minimum figure that would have to be allowed and added to the value of the land structural improvements and working capital, in order to arrive at a reasonable and fair value of this property for rate making purposes. *That opinion was supported by the figure of $10.00 per car for a 35,000 car business.* [Italics supplied.]

There is no testimony by this witness which justifies the selection of $10 or of the average annual carload volume. The figures are arbitrarily selected in order to make up a formula. Mr. Hyder emphasizes that this method of determining value is widely used commercially in valuing for sale filling stations, milk routes, newspaper circulation, laundry routes, and towel businesses (R. 1101).

This witness, in reaching the separate allowance that he did, was obviously influenced by Mr. Pexton's testimony (R. 856) that approximately $325,547.10 had been expended in grants to railroads and packing houses. In fact, he so states (R. 1125):

> Mr. Pexton's figures show, roughly, $325,000 of expenditures. * * * In my approach to this question I necessarily took into account the development of the market and the cost so expended upon the part of the Stockyards Company * * * *The purpose of the investment, in my opinion, in a fundamental way, was to build up the market, which, in turn, of course, would react to the benefit of the Stock Yard Company in increasing their business. By building up the market, I mean building up the buying power which in turn would bring more livestock into the market.* [Italics supplied.]

In so far as the witness attempted to justify his opinion on any other basis, it is apparent that he was considering *good will* as distinguished from *going concern value.* The mere fact that he admitted that he arrived at going concern value by applying an arbitrary value to the *volume* of business, as, he claimed, is done in valuing commercial enterprises for sale, is conclusive proof that "good will" was the basis of his testimony. Good will admittedly is a dominant factor in the commercial value of a private business, but it has no place in

a valuation for rate-making purposes. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 669; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 165; *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 396; *Los Angeles Gas & Electric Corp.* v. *R. R. Comm.*, 289 U. S. 287, 313.

An estimate of Mr. Hyder's testimony is afforded by the District Court. In the course of its discussion of going concern value, after a careful consideration of the decided cases, the court stated (21 F. Supp. 83, 89; R. 1270):

> It is apparent from Mr. Hyder's interesting dissertation on going concern value that unconsciously perhaps as plaintiff's expert, he included certain intangible elements that we may not consider, such for instance as good will, etc. He allowed $350,000 as a minimum going concern value, computing it at $10.00 per car for an admitted yearly average of 35,000 cars of livestock. A formula of this nature has no support in the record. He says it is similar in principle to one used occasionally for measuring the going concern or good-will value of an established business for the purposes of sale. When applied to the situation here presented, we think it arbitrary and condemned by the Los Angeles case (supra).

That the appellant realizes the weakness of its position is apparent from its specious attempt to distinguish the character of its evidence from that rejected in the *St. Joseph Stock Yards* case (appel-

lant's brief, pp. 23–28). Patently, the theory upon which appellant's valuation engineer reached his "separate allowance" conclusion is characterized by the same speculative and conjectural indulgence as that adopted by Howson in the *St. Joseph Stock Yards* case. No probative value can attach to such inapposite conclusions, drawn as they are upon unwarranted assumptions.

The Secretary's total valuation amply allows for the element of going concern value

While no attempt was made to label any specific sum as the value of the going concern element, the Secretary endeavored to place on appellant's property a total value representative of its fair value as a going concern in successful operation. The increment of value attached to the separately ascertained values of the component parts by reason of this fact is inextricably interwoven in those values and can not be segregated. The Secretary adopted a valuation that proceeded on the basis that the plant was in successful operation—a "living entity"—and that valuation includes overheads sufficient to permit full restoration of the used and useful property in its present location surrounded by railroads, highways, and packing plants which furnish and absorb its present volume of business. The record squarely refutes appellant's contention that "the testimony establishes beyond the shadow of a doubt that the land was valued as bare land and the structures as the aggregate of so many units of

material and labor," and that "that method of valuation cannot include an allowance for going value" (appellant's brief, p. 28).

The Secretary adopted the reproduction new value as determined by Mr. Zelinski, the engineer for the government (Findings 125, 126, R. 305–306). Zelinski did not include a separate allowance for going concern value in his appraisal of appellant's property, *but he did value the property of the appellant as a going concern* (Finding 136, R. 311). He looked upon the appellant's material as being in place and made his appraisal with the fact in mind that the property was able and willing to function as a successful stockyard and as a business earning an income (R. 493).

On the basis of Mr. Zelinski's testimony, the Secretary determined that the total cost of reproduction new of appellant's used and useful property, including overheads, was $2,530,201 (Finding 125, R. 305). To this figure the Secretary added $2,283 as a net addition on account of an inventory correction in the water and sewer systems (R. 305), bringing the total to $2,532,484. Applying the condition per cent of 80.545 (Finding 123, R. 304) to this figure of $2,532,484, the Secretary found the total cost of reproduction new less depreciation to be $2,039,789 (Finding 126, R. 306). Adding to this $536,825 as the value of the land found to be used and useful (R. 311) $30,267 (R. 306)[9]

[9] It is to be noted that this $30,267 is an additional allowance made by the Secretary to preserve the values determined by the engineers during the construction of the plant.

to cover one year's interest on the used and useful land during the construction period, and $139,300 (R. 312) as an allowance for working capital, the Secretary reached a figure of $2,746,181 (R. 312). After further additions in the amount of $22,500 for a bridge in the process of construction at the time of the oral argument and $24,000 for a sewage disposal plant also in the process of construction at this same time (R. 312), the Secretary found the fair value of the appellant's property to amount to $2,792,681 (R. 312). He concluded that the rate base, upon which appellant was entitled to earn a fair return, was $2,792,700 (R. 312).

The District Court's summation of this method of valuation follows (21 F. Supp. 83, 88; R. 1269–1270):

> The Government's case on valuation is made principally by the witness Zelinski, an employee of the department and charged with that work since 1934. His qualifications are recited at length in the record and include similar duties performed in other stockyard cases. His valuation is based upon material in place and upon a property able and willing to function as a stockyard and a business earning an income. As to particular details; he allowed interest during construction on the structural property, considered such items as proximity to highways, railroads, freedom from floods, access to water supply and other city services, its favorable location in regard to related industries, the effect of the city zoning ordinance,

> and that the highest and best use of the particular area in question is for stockyards. He likewise testified that he valued it higher because of its availability for a stockyard and as an assembled tract as distinguished from the several tracts in separate ownership. He also included construction overhead, general overhead, and added 5 per cent in addition for omissions and contingencies, omitting, however, organization expense. He gave consideration to the peculiar climatic conditions of Denver as affecting rot, rust, and decay. The Secretary added to Mr. Zelinski's figures $30,267 to cover one year's interest on the used and useful land during the construction period and added $139,300 for working capital. In conclusion the Secretary arrived at $2,792,700 as the rate base upon which the respondent is entitled to earn a fair return.

By this method the Secretary added to the bare cost of material and labor an amount equal to 40.17% of such bare cost. Of this 40.17% addition to bare cost of labor and material, 18.08% was applicable to construction overheads and 22.09% was applicable to general overheads (Appendix C, *infra,* p. 132).

At page 19 of appellant's brief the following statement appears:

> Government exhibits 29 and 30, being volumes 1 and 2 of the report of the Government witness, show in detail the application of unit prices to the number of units found, under the above method. Typical pages are

reprinted in the appendix of this brief, pp. 108 to 110.

To the cost of reproduction new of the materials and labor thus determined, the witness added, and the Secretary adopted, certain general and *construction* overheads as follows [italics supplied]:

Omissions and contingencies, 5%.

Engineers and architects fees, 5%.

Legal expenses during construction, 1%.

General salaries and expenses during construction, 2%.

Fire insurance during construction, ½ of 1%.

Interest during construction, 3½% or ½ year at 7%.

These percentage figures set forth by appellant represent the Secretary's allowance for general overheads—*they do not include "construction overheads."* Appellant cites as proof of the fact that construction overheads were included in the percentages set forth above "typical" sample pages 159 and 160 of Government Exhibit 29 and pages 251 and 255 of Government Exhibit 30 (appellant's brief, pp. 108–110). The conclusion is drawn that because construction overhead allowances do not appear on these sample pages they were not included at all except in the percentages set forth above. If all the pages from 159 to 182 of Government Exhibit 29 had been examined, instead of pages 159 and 160 only, which appellant cites as samples, it would have been discovered that the information on all the pages from 159 to 181 inclu-

sive is summarized on page 182. That page shows that the total cost of materials and labor for the cattle division *without overheads* is $423,667 and *at that point $65,881 is added for construction overheads* in connection with the cattle division.

In Appendix D to this brief, *infra* pages 133–134, a table is set forth which clearly shows the amount of construction overheads included by the Government's engineer in connection with all the appellant's structures and equipment. A list of the valuations placed by the Secretary on all the appellant's buildings, structures, and equipment, both used and useful and non-used and non-useful, may be found in Finding 118-a made by the Secretary (R. 299–301). The total cost of material and labor for *all* of appellant's property before construction overheads were added was found by the engineer to be $2,137,969. He then added $387,181 for construction overheads, making a total cost of material and labor, and construction overheads, of $2,525,150 (See Appendix D to this brief, p. 134). The general overheads in addition on the *entire property* amounted to $490,072 (See Gov. Ex. 28, p. S–2).[10]

---

[10] The general overheads as shown in Government Exhibit No. 28, page S–2, are made up of the following items:

Omissions and contingencies (5%)	$126,258
Engineers' and architects' fees (5%)	132,570
Legal expense (1%)	26,514
General salaries and expense (2%)	53,028
Fire insurance (0.5%)	13,257
Taxes during construction	36,481
Interest at 7% during ½ the construction period	101,964
Total general overheads	$490,072

Quite apart, however, from the fact that the structural property was valued as part of a "living organism," *the very method of ascertaining value for rate-making purposes that was employed in this proceeding* tended to establish a liberal valuation sufficient to recognize and cover the going concern element, even if it had not been covered in the valuation of the specific structures. Thus, the fact that the Secretary's method was *reproduction cost,* unmodified by considerations of actual or historical cost, is important.

The major portion of appellant's structures was built many years ago when labor and materials were considerably less expensive than at the present time (Gov. Ex. 5, Introduction). These structures for the most part will never have to be replaced *in toto,* because they can be maintained in serviceable condition by normal repairs and piecemeal replacements for which adequate allowance has been separately made. It appears, therefore, that the Secretary adopted a method of valuation which allows a substantial increment over and above actual cost. He has taken reproduction new cost less observed depreciation as a measure of value, without undertaking to weigh in the balance other factors legally recognizable which would undoubtedly have tended to diminish the value found.

When the foregoing valuations are considered in connection with the method followed in valuing the land, it is apparent that full consideration is given

to the going concern element. The government land appraiser stated that it was his endeavor "to base his valuation upon the values of similar adjacent and/or adjoining property" (Gov. Ex. 23, p. 1). Other elements of value which he considered were "*proximity of the land to highways, railroads,* its freedom from floods * * * the availability of fire protection, *easy access to the availability of water and other city advantages, such as electricity,* car lines, labor supplies, schools, churches, proper housing for labor * * * the nearness of the property to general industrial centers of the city and *the location of the land with regard to the particular related industries*" (R. 494). [Italics supplied.] These related industries which the appraiser considered as being in place consist of several packing plants and numerous railroad facilities. The setting is complete for the reproduction new of a stockyard comparable to that which now exists. The railroads and packing plants are themselves going concerns and an estimated value predicated on the proximity of the stockyard to these properties must include going concern value. Were it not for the fact that the stockyard is a going concern with a business intimately correlated with the railroad and packing industries, the land valuations determined by Mr. Zelinski obviously would be considerably reduced.

It is true that the rule in *The Minnesota Rate Cases* was designed to eliminate the possibility of valuing the land in such a way as to include an

increment of value attributable to the going concern element. When the rule is applied to gas works, water works, light plants, or railroads, that result will almost inevitably follow. However, the situation differs when an attempt is made to apply the rule to the valuation of stockyards. This is due to the fact that the industries which surround the stockyard, and whose land is taken as indicative of the value of the stockyard land, are closely related industries. The land which they own is valuable for the purposes for which it is used because it surrounds the stockyard. Consequently, the value of that land must reflect the going concern element in the stockyard land.

It is submitted that the Secretary's total valuation of appellant's entire plant which is used and useful in rendering stockyard services represents a fair rate base on which appellant should be permitted to earn a fair return. The manner of valuation was designed to give full consideration to the going concern element and the result includes an adequate allowance for that item. There is no evidence in the record which justifies the inclusion of an arbitrary amount as a separate allowance for going concern value.

The decided cases clearly establish that no separate additional allowance for going concern is required

The well settled rule, as expounded by this Court in numerous cases, is that no separate item need be

written into a rate base to cover going concern value unless there is convincing proof that such value exists and that it is not included in the total rate base. This rule was applied in sustaining an order of the Secretary fixing rates for the St. Joseph stockyards. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38. We believe that the facts in regard to going concern value in that case are so similar to those now presented as to make that decision controlling on this issue. However, there are numerous other cases which offer direct analogies in support of our position.

In *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S. 655, the appellant gas company claimed $100,000 for going concern value but the Iowa court refused to allow this additional item (144 Iowa 426, 434). Upon appeal, this Court expressly rejected capitalization of earning power and upheld the state court, saying (at p. 669):

> * * * the Court expressly took into account the fact that the plant was in successful operation. What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff power to charge more than a reasonable rate.

By this case it is decided that no separate allowance is necessary as a matter of constitutional right. All that is required is the valuation as a whole of a plant in successful operation and that was accom-

plished in this case by assigning proper unit costs to the physical items.

In *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, the company sought to enjoin the enforcement of a municipal ordinance fixing gas rates. It was contended that the rates were confiscatory. The master appointed by the District Court, after finding the value of the property and allowing 15% for overheads, determined a value of $300,000 for the item of going concern. After preparing this valuation the master, apparently on the basis of the decision of this Court in the *Cedar Rapids* case, *supra,* decided to disallow the item of $300,000 for going concern. He therefore submitted merely his physical valuation of $2,100,000, saying:

> The physical value as hereinbefore determined is reckoned upon the fact that the plant was in "successful operation" when the ordinance was enacted, otherwise its value would be much less. The "going value" [which he excluded from his final valuation] is that enhancement which results from a well developed paying business.[11]

Upon appeal, with going value the principal point in issue, this Court declared that an element of going value undoubtedly exists in an established utility plant, *but the master's report, which excluded any separate and additional allowance for going*

[11] The report of the master to the lower court is quoted at page 170–171, note 21, of the *Des Moines* case.

concern, was sustained. This Court said (at page 171):

> While there is a difference between court and counsel as to what the master meant by this, we think it is apparent that he meant to say that, applying the rule of the *Cedar Rapids* case, he had already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation, for he said that otherwise its value would be much less.
>
> As pointed out in the *Cedar Rapids* case, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public. When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the Master certifies upon the basis of a plant in successful operation, *and overhead charges have been allowed for the items and in the sums already stated,* it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves and the appellant's contention in this behalf is not sustained. [Italics supplied.]

Among the overheads included in physical value by the master in the *Des Moines* case were labor ex-

penses, engineers' fees, compensation, insurance, contingencies, cost of administration, and interest and taxes during construction. Clearly, this means the Court considered a sufficient sum had been allowed by the master when he had appraised the items of physical property and had added thereto the overheads and organization contingencies but excluded an additional separate allowance of $300,000. In referring to the cost of establishing the business, the Court said (at p. 166):

> For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a Company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business.

In recent decisions this Court has applied the same principles. In *Los Angeles Gas & Electric Corp.* v. *R. R. Comm.*, 289 U. S. 287, the company attempted to have rates fixed by the Commission set aside. The company claimed a separate allowance of $9,200,000 for going concern value. Witnesses for the company had calculated that from $9,000,000 to $16,000,000 was necessary for that item. One of these experts had formed his opinion on the basis of his stated experience (1) that a buyer will ordinarily pay for an established prop-

erty one year's gross revenue in excess of the "value" of the physical plant, (2) that he would pay approximately 15% above the cost of reproducing that plant, and (3) that going value equals not less than $25.00 per customer meter.[12] The other witness estimated the cost of securing the present business of the company ("cost" being here used as meaning efficiency of earnings below an 8% return during the developmental period) and identified going value with this estimated reproduction cost. This witness arrived at a calculation of $10,000,000 for going concern value. The Commission did not assign a separate amount for going concern value but took it into consideration generally in the appraisal of the property including allowances for overheads. It is noteworthy, however, that the overheads themselves were contested. In fact the additional overheads claimed came to $9,100,000 and were as important an item in the discrepancy between the company and the Commission's valuation as the going value itself. The company demanded an amount approximating 24% of the structural value while the Commission allowed only 6%. This Court, in sustaining the finding of the Commission, disposed of these claims as follows (at p. 319):

> It is unnecessary to analyze the testimony of these witnesses, as it is obviously too con-

[12] On these three different bases of calculation he reached values showing $16,000,000, $11,000,000, and $9,000,000, respectively, for going concern.

> jectural to justify us in treating the failure to include their estimates as a sufficient basis for a finding of confiscation.

In the opinion all previous Supreme Court cases involving going value were reviewed, and the Court, among other things, said (at pp. 313–314):

> The concept of going value is not to be used to escape the just exercise of the regulatory power in fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones.
>
> The principle as thus recognized and limited is obviously difficult of application. *Cedar Rapids Gas Co.* v. *Cedar Rapids, supra.* It does not give license to mere speculation; it calls for consideration of the history and circumstances of the particular enterprise, and attempts at precise definition have been avoided. It is necessary again, in this relation, to distinguish between the legislative and judicial functions. It is the appropriate task of the Commission to determine the value of the property affected by the rates it fixes, as that of an integrated, operating enterprise, and *it is the function of the Court in deciding whether rates are confiscatory not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use.* [Italics supplied.]

Another pertinent case is *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290. The controversy there concerned rates established by the Ohio Commission for natural gas distributed by the company. The company claimed a separate allowance for going concern of $125,000 to $140,000. The Commission rejected the separate allowance and held that whatever increment of going concern value might be found had already been recognized to a sufficient extent in the appraisal of the physical assets as part of an assembled whole, as well as by allowances in operating expense costs of developing new business. The action of the Commission was sustained by the Supreme Court of Ohio, and on appeal by this Court which said (p. 309):

> We cannot in fairness say that after valuing the assets upon the basis of a plant in successful operation, there was left an element of going value to be added to the total. Even if the addition might have been made without departure from accepted principles, the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. * * * Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not require them to do. For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled.

A similar position was taken in *Columbus Gas Co.* v. *Comm'n,* 292 U. S. 398, where this Court also

upheld the Commission in its refusal to make a separate allowance for going value. All of the estimates made by the company's experts were rejected, either upon the ground that they were too speculative or that they were based on considerations which "did not even approximate precision * * *" (p. 413). This Court stated (at p. 411):

> Objection is made also as to the disallowance of a going value for the affiliated companies. Going value was excluded both by court and by Commission as an item of property to be separately appraised and separately reported. The record justifies a holding that it was reflected in the other items and particularly in the appraisal of the physical assets as part of an assembled whole. Cf. *Hardin-Wyandot Lighting Co.* v. *Public Utilities Comm'n.*, 118 Ohio St. 592, 603; 162 N. E. 262. This, we think, was adequate.

Appellant makes the following statement in its brief (p. 28):

> Hence, we submit that the question presented is whether or not in a rate case, as distinguished from a plant-acquisition case, any separate allowance for going concern value, is to be made in the rate base. *The Court has never held such an allowance unnecessary.* [Italics supplied.]

Appellant then cites cases wherein separate allowances were made and upheld by this Court. We submit that this is not the question that arises in this

case.[13] It is not a question of what is not unnecessary but rather of what *is necessary, i. e.*, whether or not rate regulatory bodies *are required* to make separate allowances in rate bases for going concern value over and above recognition and consideration for that factor in other valuations, particularly where the claim for separate allowance is

---

[13] Appellant here is confusing the position of this Court in *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, which it cites in support of its contention that the Court has never held a separate allowance unnecessary. In that case Mr. Justice Pitney, speaking for the Court, allowed $800,000 *with the following explanation* (p. 192):

> As was then observed [Mr. Justice Pitney is here referring to the *Des Moines* case], each case must be controlled by its own circumstances. In the present case, the master expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money; and a careful examination of his very elaborate report convinces us that this is true. The amount allowed by him on this account is not open to serious question from the standpoint of appellants.

This position of this Court can be readily reconciled with its stand in the *Cedar Rapids* and *Des Moines* cases. As a matter of fact the Court stated that it intended to "adhere to what was said in *Des Moines Gas Company* v. *Des Moines*, 238 U. S. 153." The law always required that a valuation for rate making purposes must be that of a going concern. In the *Denver* case the master had *specifically stated that the physical valuation did not include any consideration of the fact that the company was a going concern.* Hence the separate allowance might be deemed necessary. In other cases *as in the instant case* the physical valuation as brought to this Court *was expressly stated to have been based upon due consideration of going concern.* Therefore, no separate allowance was required.

based upon mere speculative and theoretical conjecture. The inclusion of a separate allowance is not required unless the evidence clearly demonstrates that by reason of an inadequate valuation the result is confiscatory. No such evidence exists in the instant case.

III

The Maximum Rates and Charges Prescribed by the Secretary on Livestock Resold or Reweighed for Purpose of Sale are Lawful and are Sustained by the Evidence

The Secretary found that appellant had not been assessing a "yardage charge against traders' livestock" resold or reweighed for purposes of sale, except that resold in the commission division (R. 240, 345). This practice was found to be unreasonable and unduly discriminatory (R. 345). On the basis of that finding the Secretary prescribed the following yardage charges for such livestock (R. 346):[14]

Cattle	$0.15
Calves (under one year old)	.10
Hogs	.06
Sheep or Goats	.03
Horses or Mules	.35
Pure bred bulls	1.00

Appellant does not question the Secretary's estimate (R. 350–351) that these rates, if applied,

[14] These charges for cattle, calves, and hogs are fixed at one-half the full yardage charge on such livestock arriving by rail and at slightly less than one-half for sheep or goats. For horses or mules and pure bred bulls they are fixed at the full yardage charges on such livestock arriving by rail.

should produce $10,960 of the total estimated revenue of $530,117.

The court below found that it was unduly discriminatory for appellant not to charge yard traders for the services and facilities furnished them by the stockyard company, that the charges set out above were reasonable charges for such services, and that the evidence justified the fixing of these rates at less than the full rate on other livestock (R. 1253–1254). Appellant attacks the finding of the Secretary and the District Court as unauthorized, arbitrary, unreasonable, and unsupported by evidence. Obviously, no question of confiscation is raised, because the Secretary's order reduces no rates but simply authorizes the imposition of charges which had not hithereto been made.[15]

---

[15] Appellant asserts (appellant's brief, pp. 78, 79–82) that the Secretary, in prescribing the above resale and reweigh charges, has reduced the yardage charges for livestock resold by traders through the commission division from the full charges which have heretofore been in effect for such resales to the above charges of substantially one-half the usual full charges and that the Secretary thereby has deprived appellant of the right to collect the full charges. The Secretary's schedule of rates (R. 346) always has been treated by the government as authorizing the full charge on livestock resold through commission men. The term "plants" is applied to this livestock, which is spoken of as "planted" when turned over to a commission man for sale (R. 240). In their supplemental brief filed in the court below the appellees stated that if subparagraph (1) of the Secretary's schedule (R. 346) did not make this fully apparent, counsel was authorized to state that the Department of Agriculture does so interpret the rate schedule.

Yardage charges, including those now prescribed, are made only upon selling operations of traders or speculators who buy livestock and resell it at the stockyards. They are not, as appellant has inferred (appellant's brief, p. 79), made against buyers or upon the buying operations of traders, dealers, or speculators.

There is a separate division within that part of the stockyard known as the cattle division which is called the trader division (R. 240). No separate trader division exists either in the hog division or the sheep division of the yards (R. 240). The persons using the trader division are known as traders, dealers, or speculators. They carry on their business within the stockyards, and that business consists of purchasing livestock from commission men and either reselling the livestock in the Denver market or shipping it to other outlets (R. 942). The trader's profit is the difference between his purchase price and the amount which he eventually obtains for the livestock (R. 421).

The pens used for accommodating livestock purchased and sold by traders occupy a substantial portion of appellant's yards. In September of each year traders are assigned a block of pens containing approximately 160 pens and the adjacent alleys (R. 336–337). During the light season of the year traders are allocated pens in the commission section of the yards in order to avoid the necessity of driving livestock to the trader division (R. 337).

It appears that the only income which appellant has received heretofore because of the operations of the traders has consisted of returns from selling feed and bedding for livestock (R. 336). Occasionally traders resell some livestock through commission firms and on this they have been and still are required to pay the usual charge (R. 346). The physical characteristics of the stockyard facilities allocated to the yard traders are substantially the same as those of the facilities allocated to the commission firms; at certain periods of the year the trader division is actually located in a part of the yards which at other periods of the year is considered as the commission division (R. 416, 890). There is no material difference as between the commission and trader divisions or as between commission men and traders with respect to the warehousing of livestock (R. 240, 887–889). There appears to be no valid reason for not imposing yardage charges on livestock resold by traders along with livestock sold by producers and others.

However, the traders do much of the driving and yarding work which usually is done by the stockyard company and ordinary shippers (R. 993). The traders generally purchase feed in substantial quantities and do their own feeding, although some of the feeding of the livestock of shippers is done by the stockyard company (R. 993). In recognition of these facts the Secretary fixed these rates at approximately one-half the regular yardage charges.

The traders operate on both sides of the market. As buyers, they afford part of the market outlet. In his buying operations, the trader is a competitor of other buyers. In his selling operations, he is a competitor of shippers who have livestock on the market for sale.

Appellant apparently contends not only that the schedule of rates prescribed by the Secretary is discriminatory but also that the Secretary lacks authority under the Packers and Stockyards Act to determine the reasonableness of existing rates and to fix [redacted] rates of the kind involved, for it is asserted that the action of the Secretary was an unauthorized "interference with the sphere of management, entrusted by law to the directors of the company" (appellant's brief, pp. 10, 84). Apart from the fact that this assertion is no more applicable to the regulation of yardage rates than to other rates, it is settled that under the Packers and Stockyards Act the Secretary is authorized to establish maximum yardage charges and to include the revenue from such charges in determining rates. To this effect are *Union Stockyards Co. of Omaha* v. *United States,* 9 F. Supp. 864, 881; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 69, as well as the decision of the court below in the instant case (R. 1272).

In *Union Stockyards Co. of Omaha* v. *United States, supra,* the court said (at p. 881):

> In its substance the business of the plaintiff is to provide a market place where buy-

> ers and sellers of live stock may come together and trade. The stockyard owner, following immemorial practice, exacts its toll from sellers, not from buyers. The function of preventing discrimination imposed upon the Secretary certainly required him to ascertain whether the traders enjoyed discriminatory favor when they sell on the plaintiff's market, and in performing this function he cannot be said to have gone beyond either the letter or the spirit of the statute.
>
> It has been argued that the fact that in the business of the traders legal title to the livestock passes twice is not of controlling importance in the matter of fixing charges for stockyards services, but we think the argument ignores the very object of the existence of the stockyards, which is to provide the place and facilities by means of which buying and selling, that is, changing of title, in live stock may be carried on. Therein lies the justification for charges and, because it is a public service, the power to regulate.

And in *St. Joseph Stock Yards Co.* v. *United States, supra,* this Court stated at p. 69:

> The Secretary found that the existing rates were "unreasonable and unjustly discriminatory." * * * The evidence disclosed the services rendered in the case of cattle and other livestock, and the question is simply as to a fair determination in the light of all the circumstances. If the rates

> as prescribed were not confiscatory, the classification of rates was clearly within the Secretary's statutory authority.

Appellant argues that the special facts in this case do not justify the imposition of the charges prescribed by the Secretary for yardage. Appellant apparently contends that yard traders are afforded no free yard facilities or services (appellant's brief, pp. 72–73), yet the evidence is clear and uncontradicted that pens are allotted to yard traders and the facilities of the stockyards are made available to them without charge and that they are allowed to carry on their business at the stockyard without paying for this privilege (R. 890). It is immaterial that the "allocation of pens * * * confers no right or title to the allottees by way of lease or otherwise" (appellant's brief, p. 73).

In its findings and order, paragraph 198 (R. 338), the Secretary concluded:

> The traders have set up their places of business within respondent's stockyard and conducted it without charge, except in so far as respondent makes a profit on feed which the traders purchase and from the yardage which respondent collects on livestock resold for traders in the commission division. It may be that respondent has the right to render free services to one class of its patrons if by so doing it does not have to maintain higher charges for services rendered to others. It is, however, unjustly

> discriminatory as well as unreasonable for respondent to maintain a large section of valuable property and to incur numerous expenses in the rendition of free services to one class of its patrons and then remunerate itself through a charge on another class which is greater than necessary to cover the cost of rendering the service to the latter class.

The court below, in upholding the Secretary's findings and order, said (R. 1273):

> It is undisputed that under present conditions trader livestock makes no contributions to the support of the yards, other than the profit it may pay on the hay and grain purchased. The Secretary in his five-year recapitulation of the volume of business 1930–34, inclusive, shows that 55,405 head of cattle out of a total of 367,822 were sold and reweighed for the purposes of sale. And that during this five-year period yardage was paid on 89 per cent. of cattle arrivals and 82 per cent. of calf arrivals. Manifestly livestock using the yards but not paying therefor casts a burden upon those that do pay, irrespective of the reason. Yard traders purchase livestock—mostly cattle—from commission men and either sell in this market or reship to other outlets. On stock shipped away from this market they pay no yardage, the charges under discussion being applicable only to stock sold here. So under the practice that now obtains a considerable part of the stockyards property is

used, maintained, and numerous expenses incurred in rendering free service to this class of patrons. Necessarily the charge to the other patrons must be that much greater if plaintiff is to earn a reasonable return. The present income of the stock yards company represents, almost entirely, commissions upon sales at the yards paid by shippers; that is to say by ranchers and farmers scattered throughout the West who use the yards only occasionally. They have an investment in a ranch or in a herd, while the yard trader has no capital investment, as he makes free use of the respondent's plant for and as his place of business.

Respondent's own witnesses testified that the producer; that is the shipper, has paid for this service in the marketing charge assessed against him by the stock yard company. It follows, therefore, that this is a discriminatory practice and results in the yard trader getting for nothing a service that all other patrons of the yard pay for. And to say that this discrimination is justified because the trader is a desirable part of the market machinery, helps maintain prices, and brings about a prompt absorption of offerings on the market is no reason why he should not pay his proportionate share of the cost of conducting the market.

Public utilities should occupy a disinterested position, charging all alike for the same service. A similar charge was upheld in the Omaha and St. Joseph Stock Yards Cases (Union Stock Yards Co. of Omaha *v.*

United States, supra [9 F. Supp. 864], at pages 879–881, and St. Joseph Stock Yards Co. *v.* U. S., 298 U. S. 38, at page 70). In the Omaha Case the court declined to follow the opinion in Denver Union Stock Yard Co. *v.* U. S. [57 F. (2d) 735, 750–752], supra, on this question.

The same considerations on the basis of which the Secretary found that appellant's practice of free service to yard traders is unjustly discriminatory as against other sellers of livestock sustain the fairness of the charge fixed by the Secretary's order for yard traders at approximately half the charge fixed for other sellers. Yet appellant argues that the Secretary's order in thus fixing the yardage charge for marketing service for traders is unjustly discriminatory (appellant's brief, pp. 78–82). Appellant's contention is to the effect that under the present rates all buyers are treated alike and all shippers are treated alike because no buyer pays a yardage charge and there is a yardage charge made on each sale by a shipper. This contention obviously omits "sellers," overlooking the consideration of equal treatment of all classes of sellers and the fact that the yard trader in addition to being a purchaser is also a seller. The existing rate structure does not treat both or all classes of sellers alike. There is no evidence in the record justifying complete exemption of the livestock sold by yard traders, although the evidence, referred to somewhat at length by appellant (appellant's brief, pp. 74–77), does show that the Secretary was war-

ranted in reducing the yardage for traders on "unplanted" sales substantially by half because the trader earns part of the charge by his own activities. Thus by charging both trader-sellers and other sellers on the same basis and by making the above-mentioned allowances which equalize the charges as between them the Secretary has remedied an unfairly discriminatory schedule of yardage rates and substituted a fair and reasonable one.

Appellant has put much stress upon the existence of the so-called "transit privilege" and the extent of its use at the Denver stockyards, together with the practice of "sorting" by yard traders (appellant's brief, pp. 69–70), in an effort to establish the fact that the conditions at the Denver stockyards are so different from those at Omaha and St. Joseph as to warrant or require a different treatment of rate regulation at Denver than at other places, but it is apparent that, whatever the relative extent of the participation of a yard trader in the stockyard business at Denver and elsewhere may be, the same considerations respecting the equitableness of the yardage rate as between trader-sellers and other sellers and distribution of the cost of those rates clearly are applicable. In other words, these considerations are applicable in any situation in which the relationship between traders and other buyers and sellers and between traders and shippers is the same as, or similar to, that which exists at the Den-

ver stockyard. However, from the standpoint of these considerations, this relationship at Denver does not appear to differ materially from the corresponding relationship which exists at other stockyards at which yardage charges are imposed on traders. The functions of yard traders are substantially the same wherever they operate. Besides, whatever peculiar advantages they may have had in the past because of the existence at the Denver yards of the transit privilege granted by the Interstate Commerce Commission, these advantages have been equalized largely, it is believed, by the granting to the Missouri River markets of substantially equivalent privileges.

In *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864, the same situation with respect to yardage charges upon traders' livestock existed at Omaha as now exists at Denver. This is shown in the extract quoted from the Secretary's order by the court in that case (pp. 879–880). A yardage charge upon traders, fixed by the Secretary at half the regular yardage charge, was sustained. The court said (p. 881):

> The charges exacted from the traders and speculators are not shown to be unjust or unreasonable, and the reasons why the rates are not the same as those applicable to shippers but are substantially less were properly addressed to the discretion of the Secretary.

Following the *Omaha* case, a hearing was held regarding charges at the St. Joseph stockyards

and the Secretary, after finding that the existing rates there imposed were unreasonable, prescribed a new schedule. In the proceeding before the Secretary involving the St. Joseph stockyards it was found that the tariff of the stockyards company did not impose any charges on "resales" or "reweighs" other than "plants" and that the company was not collecting any yardage charge on the greater portion of such livestock (*St. Joseph Stock Yards Co.* v. *United States,* no. 497, October Term, 1935, R. 35–36). The Secretary ordered that a yardage charge be imposed on all livestock "resold or reweighed for purposes of sale" on a basis similar to that adopted by the Secretary in the present case, *i. e.,* approximately one-half of other regular yardage charges (see record in *St. Joseph Stock Yards* case, pp. 128–129). The validity of this charge was contested by the stockyards company but the District Court, without discussion, rejected the objections of the company and adopted the Secretary's findings. *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322. Finally, in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 70, on appeal from the District Court decision sustaining the order of the Secretary, this Court sustained the validity of the yardage charges required of traders by the Secretary's order against contentions that these charges were unreasonable and unjustly discriminatory. These decisions, culminating finally in the adjudication of this Court in *St. Joseph Stock Yards Co.* v. *United States, supra,*

are conclusive in reference to appellant's exceptions with respect to the findings and the order of the Secretary requiring traders to pay substantially one-half the regular yardage charges on sales made by them. There appears to be no material difference between the respective situations of traders at the St. Joseph stockyards and those at the Denver stockyards.

Apart from the question of whether or not it is just and proper that the yard trader should be exempted from paying for service rendered to him which is also rendered to others who pay for that service, appellant contends (appellant's brief, p. 81) that the burden of the yardage charge made against the trader will be passed by the trader to the producer of the livestock marketed and that the result will be to effect discrimination as between producers who succeed in disposing of their stock by sale in the first instance to non-trader buyers and producers who are compelled to depend upon initial purchase by a trader and subsequent resale by the latter. Here again appellant argues for equal treatment of unequals and overlooks the fact that such treatment is as discriminatory as is the unequal treatment of equals. If it is true that all charges against yard traders are passed on to producers, it is nothing less than fair that a shipper who, because of the exigencies of the market, has had to avail himself of additional marketing service, should bear the expense of that additional marketing service in the sale of his livestock.

Moreover, whether or not these charges are thus passed on by the yard trader, the best and fairest thing which can be done is to require the trader-seller who receives yardage or marketing service from a stockyard company to bear the cost of that service on as nearly the same basis with other sellers as is possible. This, it is apparent, the Secretary's order does to the extent that an equitable distribution can be worked out in substitution for the existing schedule which manifestly is unjustly discriminatory not only as against non-trader-sellers but also in reference to producers and the distribution of any portion of the yardage or marketing charges which may be passed ultimately to them.

If, as appellant contends (appellant's brief, p. 81), the yardage or marketing charge imposed on trader-sellers will be passed on by them to shippers, either partially or wholly, then it cannot be true at the same time that the yard trader will be driven out of the stockyard if the Secretary's schedule is put into effect, as appellant has inferred will happen (appellant's brief, pp. 71, 74, 76). There is, however, no justification for any supposition that imposing a yardage charge on traders would drive them from the Denver market. If, as appellant contends (appellant's brief, p. 74), they are an economic necessity at the Denver yards, they will continue to operate there. Appellant cannot consistently say that the existence at the Denver stockyard of the "sorting" and "transit" privi-

leges gives the traders at Denver special advantages and at the same time predict that they will be forced from the Denver market by imposition of what is substantially only half the regular yardage charge, especially in the face of the fact that at other markets the traders remain. In this connection it should be noted that appellant says (appellant's brief, p. 71) that because of the existence of the so-called "transit privilege" at the Denver stockyard "the purchaser at Denver can afford to pay up to the difference between the combination of the local and the through rate, because his delivered cost is no greater than if he were buying from some one who was not in a position to preserve the through rate or were buying livestock which cannot sell in transit, such as truck receipts." If this is true, it is clear that the purchaser can well afford to pay the one-half yardage charge imposed on yard traders by the Secretary's order, and that there is no ground for appellant's inference that yard traders will be driven off the market if the yardage rates prescribed by the Secretary are enforced.

But, the final and conclusive answer to appellant's intimation that the effect of the application of these rates will be to drive the yard trader from the stockyard and deprive shippers of the benefit of his services is that there is no concrete evidence whatever in the record to this effect and any testimony on the point must necessarily be entirely conjectural. In *Tagg Bros. & Moorhead* v. *United*

States, 29 F. (2d) 750, 756 (affirmed 280 U. S. 420), such a prediction was made and was disposed of by the Court in these words:

> It appears that the practice has become established for the plaintiffs to charge a certain class of persons, called speculators or yard traders, half the regular commission which shippers generally have to pay for the same service. *The Secretary evidently thinks this discrimination improper,* and in his schedule he eliminates it, and authorizes the plaintiffs to charge such traders and speculators the same rate that apply to all others. Both the commission men and the speculators are certain that the whole business of buying for resale on the market will quit, to the detriment of the livestock industry, unless the discriminatory rates are continued; but that is prophecy.
>
> *The court has no function where such forecasts of the future clash.* Abstractly, speculation appears to be a feature of all open markets everywhere, and might continue at South Omaha, even without discriminatory commission rates in favor of speculators. But the future, and not the courts, must determine. It follows that the showing of probable loss to Tagg Bros. & Moorhead on the hypothesis of half rates to speculators, instead of full rates, as prescribed by the Secretary, is immaterial. [Italics supplied.]

It is submitted that the evidence sustains the finding of the Secretary that the complete exemp-

tion of yard traders at appellant's stockyard from yardage charges on sales of livestock to others than commission men is unreasonable and unjustly discriminatory (R. 337, 338, 345). The rates prescribed by the Secretary's order for such sales by yard traders are fair and reasonable (R. 346), and therefore the Secretary's order and the decision of the court below should be sustained with respect to trader yardage.

IV

The Secretary's Determination of the Fair Value of Appellant's Land Which Is Used and Useful in the Rendition of Stockyard Services Is Amply Supported By the Evidence

The Secretary found that the total value of appellant's land which is used and useful in the rendition of stockyard services is $536,825 (Finding 115, R. 297). The District Court found (R. 1252): "The fair and reasonable value of all of petitioner's land is $724,974 and the value of petitioner's used and useful land is $536,825."

In making these findings the Secretary and the court had before them two separate land appraisals. The government appraisal was made by John A. Zelinski, an expert land appraiser for the Department of Agriculture (R. 272–273, 1271). The other appraisal was made by a board of three local realtors whom the appellant employed (R. 271–272, 1271). The Secretary adopted substantially the land valuations of Mr. Zelinski (R. 1271) which support the findings noted above.

The question presented to this Court in regard to this issue is very narrow. Appellant states in its brief (pp. 93–94):

> If the government land appraiser was a qualified expert, then the findings of the Secretary and of the trial court are based upon substantial evidence and we admit that the court, under the authorities cannot set those findings of the administrative agency aside.

Apparently the gist of appellant's argument is that the government appraiser was not qualified because he had never before valued any land in the immediate vicinity of Denver, Colorado. As the District Court stated in its opinion (R. 1271–1272):

> The argument is grounded on the alleged lack of experience of the government witness. Zelinski's previous lack of familiarity with land valuations in and about Denver is as immaterial to this discussion as is the fact that the three experts on the other side never valued any other stockyards before, either in Denver or elsewhere.

As to the general qualifications of the government appraiser there can be no question.[16] In

[16] Mr. Zelinski's education, training, and experience are detailed in his testimony (R. 458–459). The Secretary summarized Mr. Zelinski's qualifications in Finding 78 of the order (R. 272–273). For present purposes it is sufficient to note that Mr. Zelinski is a graduate in civil engineering from Ohio State University. Since graduation he has spent nearly 20 years in land appraisal work for the Interstate Commerce Commission. Subsequently he was in private practice as a consulting engineer. In 1934 he became principal valuation

Union Stock Yards Co. of Omaha v. *United States,* 9 F. Supp. 864, the District Court specifically approved Mr. Zelinski's qualifications to testify as to real estate valuations. Likewise in the litigation arising out of the rate order for the St. Joseph stockyards, the District Court accepted this witness as a qualified expert whose testimony was sufficient evidence to support the Secretary's findings, and this Court in affirming the decision observed that all the land value witnesses "were highly qualified experts." *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322, 333; 298 U. S. 38, 58.

Obviously the length of time that an appraiser has spent in a particular vicinity or the number of appraisals which he has made in that vicinity is not determinative of his qualifications to appraise a tract of land such as is involved in the instant case. If the method which is followed is designed to properly familiarize a recognized expert appraiser with general real estate values in the vicinity and is designed to uncover the factors which determine the value of the particular tract of land, the judgment of that expert cannot be discarded as worthless.

As already noted, Mr. Zelinski was the government's witness on land valuation in the proceedings

---

engineer of the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture, and in that capacity has given expert testimony in a number of rate proceedings.

involving stockyard rates at the Omaha stockyards and at the St. Joseph stockyards. In the suits which were brought to challenge the orders which were entered as a result of the rate proceedings at these stockyards, Mr. Zelinski's qualifications were attacked, among other things, upon the ground that he was unfamiliar with local conditions. In the *Omaha* case it appeared that he had never been in the Missouri Valley country before—indeed, up to that time practically all of his activities had been in the East. In the *St. Joseph* case his qualifications were contrasted by the petitioner with those of the local appraisers for petitioner, who, presumably, it was argued, knew local real estate conditions much better. There is really nothing new in the attack on Mr. Zelinski's qualifications in the instant case that has not been aired before in the previous stockyard rate cases. Mr. Zelinski's qualifications as a stockyard land appraiser have been upheld in every instance where they have been attacked in judicial proceedings.

Mr. Zelinski has described at some length the general method which he followed in preparing to appraise this particular tract of land (R. 459–463). His testimony shows that he obtained in advance a transcript of the record of the 1930 hearing before the Secretary involving this same stockyard and copies of exhibits introduced at that hearing (R. 460). From the Interstate Commerce Commission he secured such information as it had on railroad valuations in Denver. Subsequently he

visited Denver personally and inspected appellant's property (R. 460). He gave consideration to the topography, size, shape, and location of appellant's land with respect to highways, railroad trackage, and to development in that portion of the city in which the stockyard property is located. He also took into consideration the general nature of the surrounding development and the use to which the surrounding property is devoted. He gave weight to local transportation service and the available city facilities (R. 460–462). He compiled an elaborate report of sales which had taken place over a period of many years indicating the location of these sales with respect to petitioner's land and describing each of these sales in his report (Gov. Ex. 23).[17]

If any doubt remains as to Mr. Zelinski's competency to express an informed opinion as to the value of this tract of land, reference need only be made to the detailed statement which he made in the course of the hearing (R. 465–481). He followed the general method which he used in appraising the property of the St. Joseph Stock Yards Com-

[17] Appellant seems to take some comfort from the fact that in one instance Mr. Zelinski's report was erroneous as to one isolated sale (appellant's brief, p. 95). The report shows the sale price of a tract of land as being $6,000 and the sale price of the improvements on the land as being $16,000 (Gov. Ex. 23, p. 78). However, the evidence is clear that this is a reversal of figures and that the sale price of the land was in reality $16,000. In his order the Secretary recognized this error and considered the value as being $16,000 (Finding 112, R. 295–296).

pany, and that method received the approval of this Court. *St. Joseph Stock Yard Co.* v. *United States,* 298 U. S. 38, 58.

It is quite apparent from the testimony of the three witnesses who collaborated in making appellant's appraisal that they gave the property an increment of value due to its present successful use as an operating stockyard. One of the appraisers stated "I would think that if the expansion lands which I have mentioned were built up with pens or covered with railroad tracks it would add to their value" (R. 722). Again, he stated that he "considered the land in Zone 1 to be of equal value if not greater value than the land in Zone 9 because the land in Zone 1 is in the very heart of the stockyards district" (R. 718). Another of appellant's appraisers stated that in valuing the land "*you have in mind all the time that there is an industry there* and the whole thing is to keep in mind the use of the property for the highest and best purpose that it can be used" (italics supplied) (R. 764). He added "I gave thought to the intensive use of the land" (R. 765).

It is apparent that appellant's appraisers committed substantially the same error as was condemned in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 59–60. The court below took this view of the testimony, stating in its opinion (R. 1272):

> It is apparent that the company's three experts took into consideration the so-called

"stockyards value" of the property, instead of the fair average market value of similar land without considering the anticipated use. This is contrary to the rule in the Minnesota Rate Cases, 230 U. S. 352.

V

The Maximum Rates and Charges Prescribed by the Secretary Include an Adequate Allowance for All Reasonable Expenses Incurred by Appellant

The Secretary found that the reasonable expenses, exclusive of return on investment, which should be covered by the rates amount to $346,545 (Finding 182, R. 333).[18] Appellant, in challenging the sufficiency of this allowance, complains of only two items (appellant's brief, pp. 85–93). These items consist of (1) the annual allowance for dues, donations, and subscriptions which amounts to $325 and (2) the annual allowance of $1,200 for the cost of hearings under the Packers and Stockyards Act. Appellant in the brief filed with the Secretary in support of its exceptions to the tentative findings and order requested the Secretary to allow $3,250 for contributions (R. 217) and $5,000 for costs of hearings (R. 187). Appellant therefore requested for these two items an allowance of $8,250, whereas

[18] The total reasonable expense, including return on investment found in Finding 182, is $528,071. Subtract from this amount the reasonable return on investment of $181,526 and the remaining expenses amount to $346,545.

the Secretary allowed $1,525. Thus appellant claimed $6,725 more than was allowed.

Although appellant only asked the Secretary to allow $5,000 annually for the costs of hearings, it is now contended by appellant that $8,000 per year should have been allowed for this purpose (appellant's brief, pp. 89–93). No mention is made in appellant's brief of the fact that appellant requested only an allowance of $5,000 for costs of hearings in presenting its case to the Secretary.

The District Court found that slightly over $300 is contributed annually by appellant to charities and community activities which benefit appellant's employes or patrons, and that $325 annually is a proper sum to cover into rates for this expense. The court also found that $1,200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act (R. 1254).

It is apparent that the two items which appellant complains of are too insignificant to raise any question of confiscation. Regardless of whether the Secretary and the District Court were correct in determining that the allowance made was sufficient to cover appellant's necessary and reasonable expenses, the exclusion of this amount cannot affect the result of this case.

The District Court noted that allegations as to the confiscatory character of an administrative order must state facts which disclose a serious ques-

tion of unconstitutionality; to raise constitutional objections, it is not sufficient simply to plead legal conclusions (R. 1274–1275).[19] The court then said (R. 1275):

> We cannot take seriously the plaintiff's allegation that its property has been confiscated simply because the Secretary eliminated from the expense account "dues, donations and subscriptions" that during the past five years averaged from three to four thousand dollars a year and limited this item to $300 a year, the amount of the contributions thought to be actually beneficial to the Stock Yard Company employees and patrons.

While we consider it sufficient to point out that both the Secretary and the District Court found as a matter of fact that sufficient allowance is made for the items in question, that the items are too insignificant to involve any question of confiscation, and that appellant in this connection has failed to raise any substantial issue as to confiscation, nevertheless we shall discuss very briefly the actual method adopted in determining these particular expense allowances.

---

[19] In discussing this general question the court cited *Ex parte Poresky*, 290 U. S. 30; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539; *United Gas Co.* v. *R. R. Comm'n*, 278 U. S. 300; *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585; *Los Angeles Gas & Electric Corp.* v. *R. R. Comm'n*, 289 U. S. 287.

A. The allowance for dues, donations, and subscriptions is adequately supported by the evidence

Appellant contends that it is entitled to an allowance of $3,000 to $4,000 for dues, donations, and subscriptions. The Secretary included in his allowance for reasonable expenses $325 for this item. It is interesting in this connection to note that in the order promulgated by the Secretary in 1930 and subsequently set aside by the District Court, appellant claimed that its actual expenditure under this heading was $223.11 and that the Secretary had erroneously excised $81.75 from this part of appellant's expenses. *Denver Union Stock Yard Co.* v. *United States*, 57 F. (2d) 735, 753.

The general method followed by the Secretary is set out in Finding 164 (R. 324–325). The Secretary states, "In determining what dues, donations, and subscriptions should be passed on to the public through the rates charged, the guide has been that those contributions which are of peculiar benefit to respondent's employees and patrons should be covered into the rates and that the remainder of them should not be" (R. 325). This standard was applied to a complete audit of all dues, donations, and other contributions which appellant had incurred during the years 1930 to 1934 (Gov. Ex. 41, pp. 4–7). The audit was made by an accountant of the Bureau of Animal Industry of the Department of Agriculture and is set

up with two columns for each year. In one column are listed the actual expenses and in the other column are listed the amounts which the accountant considered as proper dues, donations, and contributions to be considered in determining the rates which the stockyard patrons must bear. The general principle upon which the accountant made his determination was stated by him in the administrative hearing (R. 557–558) and is the same as the principle applied by the Secretary. On cross-examination the accountant discussed his consideration of particular items included in this part of his audit (R. 577–587). On the basis of the accountant's audit and his testimony the Secretary made his finding that $325 annually should be covered into rates for this expense (R. 325), and the District Court made a similar finding (R. 1254).

The method followed by the Secretary and adopted by the District Court for determining the proper expense allowance for this item is the same as that used in framing the rate orders for the Omaha stockyard and for the St. Joseph stockyard. In each instance the Secretary's method and his finding were sustained by the courts over objections similar to those now raised by appellant. *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864, 883; *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322, 337, affirmed 298 U. S. 38. See also *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735, 753.

In *Reno Power, Light and Water Company* v. *Public Service Com'n,* 298 Fed. 790, the court said (p. 801):

> I note charges in the first eight months of 1921 for picnics, photographs of employees, rodeo stock, charitable organizations, magazines and newspapers, floral pieces, and music. Such expenditures, especially charitable contributions, are certainly to be commended, but in a suit of this character they should not be imposed on the rate payers, unless in some way it be shown that they were incurred in the service of and for the benefit of the patrons of the company.

While the cases cited by appellant appear to hold that contributions to local charities *may* properly be charged to operating expenses, in a reasonable amount, they do not hold that it is error to exclude them. The Secretary in making these exclusions is not interfering with the management which is still free to make any contributions deemed worthy. But the Secretary is simply limiting the amount of these expenditures which can be taxed to the ratepayers who, as the government accountant pointed out, also have the burden of supporting local charities in their own communities (R. 557–558). Worthy as are such charities as the Denver Community Chest, it is submitted that donations from appellant to this and other similar good causes ought to be borne by the stockholders and not the ratepayers who have their local community chests and kindred charities to support at home.

B. The allowance for expense of hearings under the Packers and Stockyards Act is adequately supported by the evidence

At the hearing before the Secretary appellant introduced evidence to show that it had actually expended $8,786.88 per year for hearings resulting from the enforcement of the Packers and Stockyards Act during the period 1930 to 1934 (R. 324). This was the result of amortising the expense of a hearing in 1930 over a five-year period during which no rate order was in effect. The 1930 rate hearing therefore was in fact paid for out of rates that were not regulated. In this connection it should be noted that spreading the costs of the hearing held in 1930 over a five-year period for the purpose of determining an annual allowance for this purpose is hardly justifiable. Up until the present hearing appellant had been engaged in only one hearing since the Packers and Stockyards Act was passed in 1921—a period of fourteen years. These rate hearings are infrequent.

The expenses of the 1930 hearing, together with the subsequent litigation arising out of it, are analyzed in Government Exhibit 38, pages 155–156.[20]

[20] At the trial of this case in the District Court appellant introduced the stipulation referred to in its brief in which the total cost of the present hearing and subsequent litigation is estimated as being $40,439.27 (appellant's brief, p. 91). This stipulation was not before the Secretary and the items included in the total are not sufficiently detailed to be analyzed.

That exhibit shows that approximately $24,000 was paid out in attorneys' fees, and approximately $14,000 represents the cost of evaluations, and appraisals which appellant had made. The Secretary in analyzing these past expenses recognizes that the rates which he is prescribing are rates for the future (R. 324). Consequently, his determination is based upon the probable future expenses which the stockyard company would necessarily incur as a result of enforcement of the Packers and Stockyards Act.

The amount which is to be covered into rates as expenses for rate hearings is a question which must be determined by the rate-maker. There is no justification for compelling the patrons of a utility to bear the total amount of such expenses limited only by the whim of the utility. The Packers and Stockyards Act has been in effect since 1921—a period of seventeen years. There has been sufficient time for those who are connected with the administration of the Act to gain the experience required to determine the amount reasonably necessary for this type of expenditure. It is apparent that once rates are fixed, expenses will cease for some time to come and future reopenings of the proceeding will be relatively inexpensive. It cannot be said that the Secretary has exceeded the limits of his discretion in allowing $1,200 annually to cover the expense of such hearings.

The District Court, in reviewing the Secretary's order, found (R. 1254):

> $1,200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act.

Appellant relies on this Court's decision in *West Ohio Gas Co.* v. *Comm'n,* 294 U. S. 63, as proving that the Secretary must be governed by actual past expenditures in determining a proper allowance for costs of rate hearings. That case is clearly distinguishable from the situation confronting the Secretary in the instant proceeding. This Court merely held that retroactive rates for a definite period must cover the expenses incurred by the utility in the hearing fixing such rates. *The decision expressly refuses to pass upon the question raised by a proceeding in which rates are being fixed for an indefinite future period.* Here it is apparent that the Secretary has made rates for the future and his allowance has been found adequate by the court below.[21]

Appellant cannot seriously contend that the cost of subsequent litigation arising out of the Secre-

[21] Many courts have held that since the expense of a valuation hearing is a non-recurring cost, it should not be considered in determining whether or not rates are confiscatory. See *New York and Queens Gas Co.* v. *Newton*, 269 Fed. 277, 290; *City of Winona* v. *Wisconsin-Minnesota Light and P. Co.*, 276 Fed. 996, 1005; *Reno Power, Light and Water Co.* v. *Public Service Comm'n*, 298 Fed. 790; *Columbus Gas and Fuel Co.* v. *City of Columbus*, 17 F. (2d) 630, 640. Compare *West Ohio Gas Co.* v. *Comm'n*, 294 U. S. 63, 72.

tary's order is any evidence as to the validity of the order. If the rates fixed by the Secretary are inadequate to the point of confiscation, appellant has no need to count upon the expenses of this lawsuit to establish the fact. But if the rates as fixed are not already inadequate, appellant cannot make them so by the amount of expense which it incurs in attempting to have the rates set aside. *Columbus Gas and Fuel Co.* v. *City of Columbus*, 17 F. (2d) 630, 640.

VI

The Rates Fixed by the Secretary Are Sufficient to Yield a Fair Return on the Fair Value of the Used and Useful Property in Addition to All Reasonable Stockyard Operating Expenses

The Secretary having found the rate base, determined as nearly as he could from the evidence the number of revenue producing livestock of each species which appellant might reasonably expect to receive at its yards under normal conditions and the amount of feeds of various sorts which it would probably sell. He then designed a schedule of yardage rates and feed profits to produce a 6½% return upon the $2,792,700 rate base in addition to all reasonable operating expenses. The schedule so designed when applied to the amount of revenue-producing business reasonably to be expected would produce $[illegible] (R. [illegible], 1254). The reasonable operating expenses were found to be $346,-

545 (R. 333),[22] and the necessary net operating income to produce a fair rate of return on the fair value of the property was found to be $181,526 (R. 333). This leaves a margin of $2,046 that the rates would produce as applied to the estimated volume of revenue-producing business over and above the reasonable return and reasonable net operating income. This schedule of rates if applied to the actual volume received in 1935, a subnormal year, would have produced a return of 6.10%, and if applied to the actual volume received in 1936 would have produced a return of 6.74% on the rate base found by the Secretary (R. 362), an average return of 6.42% for the two years.

A. The rate of return of 6½% which the Secretary used in determining reasonable rates is reasonable and is amply supported by the evidence

The Secretary found that appellant was "entitled to charge rates which would yield an average rate of return of 6½ per cent" (R. 319). The court below found that 6½% is a fair return (R. 1253). Appellant in attacking the Secretary's order alleged "that the evidence * * * sustains a rate of return of not less than 6¾% upon the fair value of petitioner's property" (R. 13).[23]

---

[22] The total reasonable expense, including return on investment, is $528,071 (Finding 182, R. 333). Subtracting from this amount the reasonable return on investment of $181,526, the remaining expenses amount to $346,545.

[23] At the trial of this case in the District Court appellant contended in brief and argument that a rate of return of 6¾% should be allowed *because Dr. Dozier's testimony sup-*

The evidence relating to the fair rate of return upon appellant's property consists of the testimony of two expert witnesses. The witness called by the government was Dr. Howard D. Dozier, an economist in the employ of the Department of Agriculture, who has testified in every stockyard rate case before the Department of Agriculture for the past ten years (R. 611–612).[24] The witness offered by appellant was Mr. Arthur Bosworth, a local investment banker, who is a stockholder and a member of the board of directors of appellant Denver Union Stock Yard Company (R. 1135–1136).

Dr. Dozier testified that the rate of return should be high enough to assure the investors in the common stock of the Denver Union Stock Yard Company an annual return of 6% on their investment (R. 644). It was his opinion "that a schedule of rates which would produce over the next few years a rate of return varying from 6½ to 7 per cent

ported that figure. Appellant's contention now is that Dr. Dozier's testimony is incompetent evidence.

[24] Dr. Dozier is a graduate of Vanderbilt University and has received his master's and doctor's degrees at Yale University. He was head of the School of Commerce at the University of Georgia and later a professor of economics at Dartmouth College. Subsequently he was employed in the Treasury Department of the United States Government and left that position to take up his present duties. His work with the Department of Agriculture has required him to make a thorough study of investments, finance, and general economic conditions. He is the author of numerous articles related to his field of study. (R. 611–612.)

would be reasonable" (R. 613–614). As the witness subsequently explained, the somewhat higher figure of 6½% to 7% was to permit the stockyard company to accumulate a reserve "to make good that 6 per cent if in any year it doesn't earn it currently" (R. 646).

Appellant's witness, Mr. Bosworth, testified that he was of the opinion that a somewhat higher rate of return was reasonable in this case. It was his opinion that the Denver stockyard could be capitalized on a basis of bonds earning 4½% and preferred stock earning 6½%, providing that there was a sufficient amount of common stock earning 10% (R. 1145). On this basis he concluded that 8% would be a reasonable return on appellant's property, used and useful in rendering stockyard services (R. 1146).

There can be no question but that the witness called by the government was a well qualified expert who had made a thorough study of the matter under investigation. The District Court in accepting his opinion stated (R. 1276):

> Mr. Dozier has testified in a great many rate cases before the Department as an expert on the rate of return and his exhaustive studies on this question are to be found in Gov. Ex. 45. The plaintiff's only witness was Mr. Arthur Bosworth, a local investment banker of high standing, and a stockholder and member of petitioner's board of directors. We take judicial notice that the plaintiff enjoys a monopoly with no prospect

> of competition. Also we may note the fall in the rate of return on conservative investments over the past five or six years. *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 284 U. S. 248, at p. 260.

The substance of appellant's contentions (appellant's brief, pp. 96–101) in regard to this issue is that the government witness did not base his opinion upon the proper information and that he reached the wrong conclusion upon the information which he had before him. This amounts to an attack upon the witness' qualifications and his method. As pointed out by the District Court, there can be no question as to Dr. Dozier's qualifications. He has testified upon this subject and related economic subjects in several cases which have been before this Court.[25] A brief description of his investigation and the information upon which he based his opinion will suffice to show that his opinion is substantiated by the facts.

Dr. Dozier in the course of his regular work "began, a number of years ago, the compilation of the price of public utility and industrial bonds, preferred stocks and common stocks and the earnings of the issuing corporation" (R. 616). The results of this study up to the date of the administrative hearing in this case are set out in Government Exhibit No. 45. After forming a tentative opinion

---

[25] *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Morgan* v. *United States*, 298 U. S. 468, No. 581, October Term 1937; *Acker* v. *United States*, 298 U. S. 426.

on the basis of this personal study, Dr. Dozier checked his opinion against material obtained from other sources, including statistics taken from various business digests (R. 619–621). The witness then made a statistical comparison of the net return earned by the Denver Union Stock Yard Company, stockyards generally, public utilities, and industrials for the purpose of determining the relative stability of the various types of enterprises (R. 621–623). This study revealed that stockyard companies have been subject to less variation in their earnings from year to year than "either public utilities generally or industrial corporations generally" (R. 623). On the basis of all this information and his intimate knowledge based on years of study, Dr. Dozier formed the opinion which is the basis for the findings of the Secretary and the court below.

It is submitted that a return of 6½% is not only an adequate but a liberal return on a business such as appellant's which, as the court below pointed out, enjoys a virtual "monopoly with no prospect of competition" (R. 1276). The record shows that stockyards in general and the Denver Union Stock Yard in particular have proved to be remarkably stable enterprises during the past ten years (R. 622). Throughout the whole period of the depression appellant has never defaulted on its bonds or its preferred stock and has always paid a substantial dividend on its common stock (Gov. Ex. 38, p. 290). Certainly, a rate of return which is suf-

ficiently high to yield an average for a period of years of over 6% on the investment of all types of security holders can not be described as confiscatory.

There is abundant evidence in the record which discloses that general business conditions at the time of the hearing were such as to make a return of 6½% a comparatively high rate of return for a business like appellant's. Appellant argues that there is no evidence which justifies the Secretary in using a lower rate of return than that found reasonable in various other stockyard hearings held between 1930 and 1932. This is not the fact. The record shows that long-term government bonds which sold to yield 3.77% in 1926 reached a high point of 4.28% in January 1932, and since that time have steadily declined so that the average yield was only 2.59% on June 14, 1935 (R. 615). The table on page 620 of the record compiled from Moody shows that the average bond yield in 1921 for industrials was 7.04% and for public utilities was 7.17%. In 1932 the average yield was 6.71% for industrials and 6.30% for public utilities, and since that time the yield has steadily declined so that in May 1935 it was 4.29% for industrial bonds and 4.52% for public utility bonds. Furthermore, appellant's own witness testified that the general trend on good long term bonds had been steadily downward from 1928 to the time of the present hearing (R. 1161–1162). The history of preferred stocks is very similar to the history of bonds in respect to the yield obtainable from such securities. Dr. Dozier

testified that it was his opinion that good preferred stocks would yield approximately 1% less in 1935 than in 1930 (R. 617). As to the yield of common stocks, business conditions in recent years have been such that it would be practically impossible to chart intelligently the return of such investments. However, we believe that this Court may properly take judicial notice of the fact that in view of general business conditions a stable annual return of over 6% on common stocks would be more than adequate.

This Court in *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 692, stated:

> What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

See also *Los Angeles Gas & Electric Corp.* v. *R. R. Comm'n*, 289 U. S. 287; *Wabash Valley Elec. Co.* v. *Young*, 287 U. S. 488.

It is submitted that reviewing the evidence in the light of the above decisions there can be no question as to the adequacy of the rate of return which the Secretary found reasonable. This Court has in other instances sustained rate orders which were designed to or actually did yield a return of 6½% or less. In *Lindheimer* v. *Illinois Tel. Co.*, 292 U. S. 151, the rate order was sustained although the rates would have yielded only 6½% in 1931 and 5½% in 1932. In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 72, it was pointed out that although the Secretary had found that 7% would be a reasonable rate of return, the rates would have yielded only 5.67% in the test year. In *Dayton P. & L. Co.* v. *Comm'n*, 292 U. S. 290, this Court, in sustaining a rate order for a small utility with physical assets of less than $1,000,000, said (p. 311):

> The appellant contends that to avoid confiscation the rate of return should be 8 per cent, instead of 6½, which was allowed.
>
> In view of business conditions, of which we take judicial notice (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, 260), the rate allowed was adequate. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra*, p. 319.

It is submitted that the evidence in this case sustains the conclusion reached by the Secretary and the District Court that a rate of return of 6½% upon the fair value of appellant's property,

used and useful in the public service, is just and reasonable.

B. The rates prescribed by the Secretary, if applied to the volume actually received subsequent to the test period would have yielded an amount sufficient to cover all reasonable operating expenses and a fair return upon the fair value of appellant's used and useful property

Appellant calls the attention of this Court (appellant's brief, pp. 100–101) to the fact that the rates prescribed by the Secretary actually produced a net operating income of 6.10% on the rate base in 1935 and 6.74% on the same rate base in 1936.[26] It was the stated purpose of the Secretary to prescribe a schedule of reasonable rates which would produce a normal rate of return that was not so low as to touch the line which separates the zone of reasonableness from that of confiscation.

All witnesses were in agreement that appellant's 1935 receipts would be unusually low and would not be indicative of the probable annual receipts for subsequent years. Dr. Dozier testified that in considering the reasonable rate of return he expected the 1935 volume would be subnormal and that it was unlikely the rates would produce 6½% in that year (R. 614). The testimony of Mr. C. L. Harlan, Principal Agricultural Statistician in

[26] These returns for the respective years would have been 5.68% and 6.33% had the Secretary, as the appellant claims he should have, considered $11,592 as stock-show, rather than stockyard, income.

charge of the Division of Crop and Livestock Estimates of the Department of Agriculture, clearly demonstrates that 1935 was a subnormal year and that a general upward trend in receipts might be expected at Denver for the following five years (R. 1186–1196). Appellant's own witness, the manager of the Denver stockyard, testified that neither 1934 nor 1935 could be taken as indicative of future business and that he did not feel the business would be back to normal before January 1, 1937 (R. 962).

The test of the character of a schedule of rates from the standpoint of confiscation is what the schedule yields when applied to actual business. Conceivably the Secretary, with the facts of this record before him, could have arrived at a schedule which he thought reasonable without recourse to a computation involving any specific rate of return. Had he done so, it might be that appellant could have been heard to complain that the Secretary had acted arbitrarily, or that he had failed to consider pertinent evidence. Appellant might even have shown that its property was confiscated by undervaluation or by failure to determine proper reasonable costs. However, if in the course of litigation it had been stipulated that the rates made without resort to a computation involving any specific rate of return did as a matter of fact produce 6.10% of the fair value in a subnormal year and 6.74% the next year, appellant could hardly claim

such rates to be confiscatory at a time when most investors in conservative securities were compelled to be satisfied with returns considerably smaller.

It is submitted that the Secretary acted reasonably and fairly in using 6½% as a rate of return factor in arriving at the rates which he prescribed, and that the 6.10% and the 6.74% returns which the rates would actually have earned for the years 1935 and 1936, respectively, are not only reasonable rates of return but are well above the line of confiscation.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

ROBERT H. JACKSON,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

WENDELL BERGE,
JAMES C. WILSON,
RAYMOND J. HEILMAN,
Special Assistants to the Attorney General.

EDWARD J. HICKEY, JR.,
Special Attorney.

MASTIN G. WHITE,
Solicitor, Department of Agriculture.

APRIL 1938.

APPENDIX A

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, Secs. 301–408 (U. S. C., Title 7) provides in part as follows:

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

* * * * *

SEC. 302. "Stockyard" defined: determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 301 to 317 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

* * * * *

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

* * * * *

SEC. 309.—

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

* * * * *

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will

be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

* * * * *

SEC. 316. For the purposes of this title, the provisions of all laws relating to the

suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

SAMPLE SUMMARY PAGE FROM GOVERNMENT EXHIBIT 29

A summary of the information contained in the sample pages cited by appellant appears on page 182 of Government Exhibit 29. These sample pages, but not the summary, are reprinted in appellant's brief at page 108. It will be noted that the overheads are added on the summary page.

Cattle Division, open pens—page 182, Gov. Ex. 29

	Material		Labor	
	Unit Price	Total	Unit Price	Total
Total Material and Labor		299, 744		123, 923
Total Without Overheads			423, 667	
Contract Work		175, 443		59, 936
Add Material 16%		28, 071		
Add Labor 20.5%				12, 287
Company Work		124, 301		63, 987
Add Material 4.5%		5, 594		
Add Labor 9%				5, 759
Plant Cost, 18893 c. y. Concrete @ $0.75		14, 170		
Total Material and Labor		347, 579		141, 969
Total With Overheads			489, 548	

NOTE.—The $28,071, the $12,287, the $5,594, the $5,759, and the $14,170 shown in the table make up the $65,881 of construction overheads for the cattle division to which reference is made in the text.

APPENDIX C

SUMMARY OF VALUATION OF STRUCTURES

The following summary shows the cost of reproduction new, the condition per cent, the reproduction new less depreciation, and the construction overheads and general overheads of appellant's used and useful property as found by the Secretary:

	Reproduction New	Condition Per cent	Reproduction New Less Depreciation	Percentage of Overhead Inclusion
				Percent
Cost of Material and Labor before Overheads (See Appendix D, pp. 137-138)	$1,794,480	80.545	$1,445,364	
Construction Overheads (See Appendix D, pp. 137-138)	324,481	80.545	261,353	18.08
Total Cost of Labor, Materials and Construction Overheads	2,118,961		1,706,717	
General Overheads [1] (See Order, para. 125, R. 305)	411,240	80.545	331,233	22.09
Adjustment (See para. 125, R. 305)	2,283	80.545	1,839	
Total cost of Labor and Materials and all Overheads of used and useful structures and equipment	$2,532,484	80.545	$2,039,789	
Ratio of all Overheads to Cost of Labor and Material, i. e., 18.08% of $1,445,364, plus 22.09% of $1,445,364				40.17

[1] The $411,240 general overheads is arrived at as follows (R. 305):

Omission and contingencies 5%	$105,948
Engineer's expenses and architect's fees	111,245
Legal expenses 1%	22,249
General salaries 2%	44,498
Fire insurance ½ of 1%	11,125
Taxes during construction	30,613
Interest during construction	85,562
Total	$411,240

Note.—These percentages are applied against $2,118,961, which figure represents the total cost of reproduction new of labor and material.

APPENDIX D

The following table gives by appraisal units the total cost of material and labor before construction overheads, the construction overheads, and the total cost of materials and labor after construction overheads, together with references to the exhibits where the figures are shown:

	Total material and labor before construction overhead	Exhibit	Page	Construction overheads	Total material and labor after construction overheads
New Exchange Building	194,902	29	62	33,357	228,259
Old Exchange Building	83,590	29	88	13,310	96,900
Chute House	27,813	29	105–6	4,548	32,361
Garage & Shop	18,823	29	114	3,129	21,952
Club House [1]	26,721	29	123	4,792	31,513
Stadium [1]	149,371	29	137	27,000	176,371
Stadium Run over Shed	789	29	139	128	917
Stadium Hook-up Shed	2,903	29	142	442	3,345
Stadium Heating Plant [1]	5,189	29	145	926	6,115
Restaurant V 13	1,599	29	148	220	1,819
Stadium Restaurant V 14 [1]	5,112	29	152	954	6,066
Carpenter Shop	726	29	154	111	837
Material Shed	371	29	155	65	436
Hide Storage Building [1]	12,394	29	158	2,451	14,845
Cattle Division Open Pens	423,667	29	182	65,881	489,548
Cattle Division Feed Lots	2,538	29	184	185	2,723
Cattle Division Cattle Dip	4,337	29	187	829	5,166
Branding & Dehorning Chute #1	3,340	29	190–1	374	3,714
Branding & Dehorning Chute #2	3,156	29	194	481	3,637
Branding & Dehorning Chute #3	4,022	29	196	734	4,756
Foot viaducts	11,227	29	199	2,002	3,229
Stock viaduct	16,611	29	201	3,073	19,684
Subway	5,758	29	204	1,308	7,066
Hog Shed #1	9,011	29	210	1,490	10,501
Hog Shed #2	10,791	29	215–16	1,766	12,557
Hog Shed #3	10,763	29	221–2	1,765	12,528
Hog Shed #4	15,042	29	229	2,720	17,762
Hog Shed #5	5,620	29	234	1,086	6,706
Hog Immunization Plant	5,615	29	240	1,073	6,688
Sheep Dip and Drain Pens	4,227	29	246–7	806	5,033
Sheep Pens at Sheep Dip	1,819	29	250	374	2,193
Sheep Barn #1	231,897	30	290	50,357	282,254
Sheep Barn #2	234,889	30	328	50,576	285,465
Horse and Mule Div. H&M 1	32,095	30	333	5,721	37,816
Horse and Mule Div. H&M 1A	434	30	334	75	509
Horse and Mule Div. H&M 2	13,362	30	338	2,447	15,809
Horse and Mule Div. H&M 3	3,640	30	340	530	4,170
Horse and Mule Div. H&M 4	10,303	30	344	1,653	11,956
Horse and Mule Div. H&M 5	18,418	30	350	3,339	21,757
Horse and Mule Div. H&M 6	8,584	30	355	1,505	10,089
Horse and Mule Div. H&M 7	12,787	30	359	2,376	15,163
Horse and Mule Div. H&M 8 [1]	5,020	30	362	922	5,942

[1] Represents property found by the Secretary to be not used and useful in the rendition of stockyard services.

	Total material and labor before construction overhead	Exhibit	Page	Construction overheads	Total material and labor after construction overhead
Horse and Mule Div. H&M 9 [1]	10,913	30	385	1,972	12,885
Horse and Mule Barn Y 8	76,005	30	379	13,512	89,517
Blacksmith Shop	4,456	30	382	668	5,124
Retaining Wall RW #1	4,240	30	383	1,045	5,285
Corrals	4,701	30	390	633	5,334
Hay Barn Y 1	5,031	30	392	991	6,022
Hay Barn Y 2	3,677	30	394	651	4,328
Hay Barn Y 3	11,226	30	396	2,146	13,372
Hay Barn Y 4	15,501	30	398	3,063	18,564
Hay Barn Y 5	5,015	30	400	974	5,989
Corn Tank	2,703	30	402	486	3,189
Burlington Chutes [1]	24,819	30	405	4,835	29,654
Union Pacific Chutes [1]	29,149	30	408	5,612	34,761
C. & S. Chutes [1]	9,960	30	411	1,891	11,851
River Chutes [1]	14,704	30	416	2,818	17,522
Truck out Pens	865	30	418	51	916
Hog & Sheep Truck-in Dock	2,899	30	423	527	3,426
Drive-in Office	768	30	426	134	902
Cattle Scale #1	3,977	30	429	715	4,692
Cattle Scale #2	3,542	30	431	650	4,192
Cattle Scale #4	5,055	30	435	908	5,963
Cattle Scale #5	4,583	30	438	811	5,394
Cattle Scale #6	4,566	30	441	813	5,379
Cattle Scale #10	5,274	30	445	948	6,222
Cattle Scale #11	5,324	30	450	955	6,279
Sheep Scale #7	4,791	30	452	872	5,663
Sheep Scale #8	4,608	30	455	819	5,427
Sheep Scale #12	4,467	30	458	739	5,206
Hog Scale #3-9	5,147	30	463	972	6,119
Hog Scale #13-14	5,492	30	468	1,000	6,492
Hay Scale Y 2A	994	30	470	186	1,180
Hay Scale Y 3A-Y3B	1,351	30	472	249	1,600
Hay Scale Y 5A	996	30	474	184	1,180
Manure Dump	6,718	30	476	1,340	8,058
Manure Dump Office	787	30	478	136	923
Manure Dump Shed	1,207	30	480	228	1,435
Railroad Tracks T-1 [1]	49,606	30	485	8,433	58,039
Trackmens' Tool House [1]	222	30	486	39	261
Yardmasters' Office [1]	309	30	488	55	364
General Roadways	11,265	30	489	2,545	13,810
Sewer System	82,323	30	495	15,483	97,806
Water System	48,359	30	500	8,705	57,064
Fire Protection	1,337	30	502	67	1,404
Flooding Equipment	6,910	30	503	311	7,221
Horses, Mules & Harness	2,851	30	505	128	2,979
Total used and useful and not used and useful	$2,137,969			$387,181	$2,525,150
Not used and useful [1]	343,489			62,700	406,189
Used and useful	$1,794,480			$324,481	$2,118,961

[1] Represents property found by the Secretary to be not used and useful in the rendition of stockyard services.

APPENDIX E

REVENUES PROCURABLE FROM AN APPLICATION OF THE RATES PRESCRIBED BY THE SECRETARY AS REASONABLE TO THE VOLUME USED AS A RATE FACTOR COMPARED WITH THE REVENUES PROCURABLE FROM THE RATES UNDER INVESTIGATION APPLIED TO THE SAME VOLUME

The revenues produced from an application of the rates prescribed by the Secretary to the volume of business used by him as a rate factor are $530,117. The revenues produced by an application of the rates under investigation to the volume used by the Secretary as a rate factor are $579,342. The $530,117 produced by the prescribed rates is 91.5% of the $579,342 produced by the rates under investigation.

The following table shows the method and computations by which these results were obtained:

	Volume used as a rate factor (record 342)	Rates under investigation (record 238)	Revenues from rates under investigation	Rates prescribed (record 350)	Revenues from rates prescribed
Yardage:					
Cattle:					
Rail	325,000	$0.35	$113,750	$0.30	$97,500
Truck-ins	75,000	.40	30,000	.35	26,250
Resales	56,000			.15	8,400
Bulls	850	1.00	850	1.00	850
Calves:					
Rail	20,000	.25	5,000	.20	4,000
Truck-ins	30,000	.27	8,100	.25	7,500
Resales	3,000			.10	300
Hogs:					
Rail	25,000	.12	3,000	.12	3,000
Directs	145,000	.12	17,400	.06	8,700
Truck-ins	225,000	.14	31,500	.14	31,500
Resales	250			.06	15

	Volume used as a rate factor (record 342)	Rates under investigation (record 238)	Revenues from rates under investigation	Rates prescribed (record 350)	Revenues from rates prescribed
Yardage—Continued.					
Sheep:					
Rail	2,000,000	$0.08	$160,000	$0.075	$150,000
Truck-ins	80,000	.10	8,000	.10	8,000
Resales	75,000			.03	2,250
Horses & mules	6,000	.35	2,100	.35	2,100
Total yardage			$379,700		$350,365
Feed, Bedding, Etc.:					
Hay, cwt. on fence	136,000	[1] [2] .609	82,824	.50	68,000
Hay, cwt. fed	34,000	[1] [2] .609	20,706	.60	20,400
Corn, bu	20,000	[1] .651	13,020	.45	9,000
Straw, bales	18,500	[1] .44	8,140	.40	7,400
Miscl. feed, lbs	150,000	[3]	1,000		1,000
Total revenue procurable			$125,690		$105,800
Miscellaneous Revenue			73,952		73,952
Total revenue procurable			$579,342		$530,117
			100.0%		91.5%

[1] These gross profits made by respondent on the amount of the various feeds and bedding sold during the 5 years 1930 to 1934 inclusive are determined by the feed sale figures shown in Government Exhibit 38, pp. 77 to 83.

[2] Average.

[3] Estimated.

APPENDIX F

REVENUE PRODUCING VOLUME RECEIVED BY APPELLANT COMPARED WITH VOLUME REASONABLY TO BE ANTICIPATED OR THE VOLUME RATE FACTOR USED BY THE SECRETARY IN DETERMINING REASONABLE RATES

	Receipts	Revenue producing Volume	
	Number head of Cattle		
Secretary's Rate Factor [1]			400,000
1935 [2]	482,421×89% [2]=	429,355	
1936 [2]	489,768×89% [2]=	435,894	
	Number head of Calves		
Secretary's Rate Factor [1]			50,000
1935 [2]	78,279×82% [2]=	64,189	
1936 [2]	73,767×82% [2]=	60,489	
	Number head of Hogs		
Secretary's Rate Factor [1]			395,000
1935 [2]	362,919×76% [2]=	275,818	
1936 [2]	496,635×76% [2]=	377,443	
	Number head of Sheep		
Secretary's Rate Factor [1]			2,080,000
1935 [2]	2,903,355×75% [2]=	2,177,516	
1936 [2]	3,023,893×75% [2]=	2,267,920	

[1] See Record 342, paragraph 206.

[2] See Record 336, paragraphs 188, 189, 190 for an explanation of the use of these percentages.

U. S. GOVERNMENT PRINTING OFFICE: 1938

BLANK

PAGE

p. 3

SUPREME COURT OF THE UNITED STATES.

No. 798.—October Term, 1937.

The Denver Union Stock Yard Company, Appellant, vs. The United States of America and Secretary of Agriculture.	Appeal from the District Court of the United States for the District of Colorado.

[May 31, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

November 8, 1934, the Secretary of Agriculture initiated proceedings in which, February 17, 1937, after extended investigation, taking of much evidence and full hearing, he made findings of fact and an order, prescribing maximum rates to be charged by appellant for services rendered by it.[1] March 9, 1937, it commenced this suit[2] to set aside the order on the ground that the prescribed rates are confiscatory and that enforcement of the order would deprive the company of its property without due process of law in violation of the Fifth Amendment. The case was submitted on stipulations and the evidence before the Secretary. The court made findings of fact, stated conclusions of law, announced opinion, 21 F. Supp. 83, and entered decree dismissing the bill.

The challenged rates include marketing charges per head; they are applicable only when sales are made, and are the same without

1 7 U. S. C. § 211. "Whenever after full hearing . . . the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

2 7 U. S. C. § 217; 28 U. S. C. §§ 44, 47(a).

regard to the time the stock remains in the pens. These are called "yardage charges." Appellant makes no charge for use, as such, of pens or other facilities; its charges for feed, bedding and other services are regulated by the order. About three-fourths of the total number of animals received at the yard are sold there. Some are sold to traders, also called dealers and speculators, and held in the yard until sold again. Appellant has never made any charge against traders for resales or reweighing for sale except when the resale was through commission men. For that service, the order prescribes rates which for convenience may be referred to as "yardage charges to traders." Appellant's activities are not confined to services covered by the order. It unloads and loads livestock from and into cars of railroads serving the yard, and receives from the carriers compensation not regulated by the Secretary. If enforced, the order will reduce revenue from charges for yardage services by about eight and one-half per cent, and from charges for other services by about nineteen per cent; miscellaneous revenues in a substantial amount are not affected; total revenue will be reduced by about eight and one-half per cent.[3]

To ascertain the amount on which appellant is entitled to earn a return, the Secretary determined what land and structures were used and useful for performance of the services, and to present value of land added cost of reproduction new less depreciation of structures, and allowances on account of a bridge and sewage disposal plant being built, and working capital. The total is slightly less than $2,792,700, which the Secretary adopted as rate base. He found six and one-half per cent to be a reasonable rate of return, $530,117 the revenue procurable if prescribed charges be put in effect, and $346,545 the operating expenses, leaving a net return of $183,572, slightly more than six and one-half per cent on the value of the property.

Appellant accepts as correct the Secretary's estimate of cost of reproduction less depreciation of property found to be used and useful, and also the allowances above mentioned. But it objects to his exclusion of land and improvements used for a stock show

[3] The Secretary in his brief furnishes the Court the following statement. "The revenues produced from an application of the rates prescribed by the Secretary to the volume of business used by him as a rate factor are $530,117. The revenues produced by an application of the rates under investigation to the volume used by the Secretary as a rate factor are $579,342. The $530,117

and for trackage and facilities for unloading and loading livestock, to his valuation of the land, to his treatment of going concern value, to his refusal to allow certain items that it claims to be operating expenses, and to the rate of return found by him to be reasonable.

The rate base. As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of

---

produced by the prescribed rates is 91.5% of the $579,342 produced by the rates under investigation.

"The following table shows the method and computations by which these results were obtained:

	Volume used as a rate factor	*Rates under investigation*	*Revenues from rates under investigation*	*Rates prescribed*	*Revenues from rates prescribed*
Yardage:					
Cattle:					
Rail	325,000	$0.35	$113,750	$0.30	$97,500
Truck-ins	75,000	.40	30,000	.35	26,250
Resales	56,000	....	.....	.15	8,400
Bulls	850	1.00	850	1.00	850
Calves:					
Rail	20,000	.25	5,000	.20	4,000
Truck-ins	30,000	.27	8,100	.25	7,500
Resales	3,000	....	.....	.10	300
Hogs:					
Rail	25,000	.12	3,000	.12	3,000
Directs	145,000	.12	17,400	.06	8,700
Truck-ins	225,000	.14	31,500	.14	31,500
Resales	250	....	.....	.06	15
Sheep:					
Rail	2,000,000	.08	160,000	.075	150,000
Truck-ins	80,000	.10	8,000	.10	8,000
Resales	75,000	....	.....	.03	2,250
Horses & mules	6,000	.35	2,100	.35	2,100
Total yardage	.....	....	$379,700	....	$350,365
Feed, Bedding, Etc.:					
Hay, cwt. on fence	136,000	.609	82,824	.50	68,000
Hay, cwt. fed	34,000	~~.960~~ .609	20,706	.60	20,400
Corn, bu.	20,000	.651	13,020	.45	9,000
Straw, bales	18,500	.44	8,140	.40	7,400
Misel. feed, lbs.	150,000		1,000	....	1,000
Total revenue procurable	.....	....	$125,690	....	$105,800
Misc. Revenue	.....	....	73,952	....	73,952
Total revenue procurable	.....	....	$579,342	....	$530,117
	.....	....	100.0%	....	91.5%

return upon the value of property used, at the time it is being used, to render the services. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41. *Minnesota Rate Cases*, 230 U. S. 352, 434. *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 690. *Board of Commrs.* v. *N. Y. Tel. Co.*, 271 U. S. 23, 31. *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 414. *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U. S. 287, 305. But it is not entitled to have included any property not used and useful for that purpose. Cf. *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 56.

The stock show property excluded. The stock show is held on property owned by appellant and is conducted by an incorporated association not organized for pecuniary profit. It continues for about one week in January of each year. The Secretary found a part of that property, which is operated by the Colorado Horse and Mule Company, to be used and useful for performance of services covered by the rates regulated by him, and included it in the rate base. He appraised the rest of the show property, which consists of 2.633 acres and improvements thereon, at $219,033, but excluded it as not used for the performance of services covered by the rates he regulates.

For payment of expenses of the show there is used the money received for admission to it and to other events on the property, and also some that is donated for that purpose. Appellant assumes the carrying charges, including interest and taxes; when the show is unable to pay rental sufficient to cover all charges, appellant absorbs the deficit. It requested findings in substance as follows: Large quantities of livestock are entered in the show and much is sold on the show property. Some is sold in the yards operated by appellant. The show attracts buyers and throughout the year widens the outlet for producers' stock, operates to increase receipts, makes for improvement of stock raised and for higher prices, has educational value, and advertises the market. It is supported by appellant in good faith and in the belief that it stimulates its business and that of livestock producers. These facts are not in substantial conflict with the Secretary's findings, and may be taken as established by the evidence. But they are not sufficient to prove that the property excluded is used and useful for the performance of services covered by rates being regulated by the Secretary. None of those services is performed on

or by the use of any of that property. The Secretary rightly says "If it is appellant's contention that the stock show increases the stockyard business, then it should request that a reasonable allowance be made for advertising expense as a charge against its income." In support of that view he adds "Advertising or developmental expenses to foster normal growth are legitimate charges upon income for rate purposes if confined within the limits of reason. *West Ohio Gas Co.* v. *Comm'n*, 294 U. S. 63, 72." Appellant's contention that the court erred in upholding the Secretary's exclusion of that item is not sustained.

Trackage and unloading and loading facilities. The Secretary appraised that property at $177,108. He excluded it as not used for performance of any stockyard service. Appellant leases the trackage to railroad carriers for substantial rentals. It does not claim that exclusion of that part of the item is confiscatory and fails to show it prejudicial. It follows that the court did not err in upholding the Secretary's determination. The unloading and loading facilities include ways between docks and the pens where the stockyard services are rendered. Appellant uses these facilities to unload and load livestock. That is a service for which the carriers pay appellant. Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison Ry.* v. *United States*, 295 U. S. 193, 198. The court rightly refused to disturb the Secretary's ruling as to these facilities.

Land value. The Secretary's finding depends on the appraisal and testimony of his valuation engineer. Appellant maintains that it is not supported by evidence because the engineer was not a qualified expert witness. It concedes that, if he was competent, the valuation must be sustained. To support its point, appellant relies on the fact that the appraiser had never lived in Denver or previously appraised any land there or in that vicinity or assembled or appraised any large industrial tracts. The significance adverse to competency that might be attributed to these facts if they stood alone is negatived by others disclosed by the record. The appraiser is an experienced civil engineer; he was long engaged in land appraisal work under the Interstate Commerce Commission. He later had private practice as consulting engineer and in 1934 became principal valuation engineer of the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture; in that capacity he has given testimony in a number of

rate proceedings. His report submitted to the Secretary discloses elaborate investigation and consideration of prices paid for land, of the Interstate Commerce Commission's appraisals of lands in the vicinity and of other facts material to the ascertainment of value of the land in question. It cannot reasonably be said that, because of his lack of earlier knowledge of local conditions, the finding was made without evidence.

Going concern value. Appellant maintains that, while admitting it exists in the property, the Secretary failed to include in rate base any allowance on account of it, and that the evidence requires addition of at least $325,000 to cover that element.

In substance, the Secretary's findings state: The stockyard is a going concern; it has a long history of efficient management and has won a reputation for good service; it has been financially successful. His valuation engineer (whose figures and valuation are the basis of the Secretary's appraisal) considered going concern value but did not include a separate amount for it. In adopting the value of the land and the cost of reproduction new less depreciation of structures, consideration was given to the element of going concern value. Adequate allowance has been included, although no separate item on its account has been set forth. The findings contain a "summary of the value of used and useful land, the cost of reproduction new of structures and equipment, including direct construction overheads, indirect overheads, interest on used and useful land during construction, and working capital, and the cost of these, less depreciation where depreciation exists, of respondent [appellant] as a going concern.[4] . . . It is found

[4]

	Cost of Reproduction New	*Condition Per Cent*	*Cost of Reproduction New less Depreciation*
Land—Used and Useful	$536,825	100	$536,825
Total Material, Labor, Direct Construction Overhead and Indirect Construction Overhead	2,532,484	80.545	2,039,789
Interest on Used and Useful Land during Construction	37,578	80.545	30,267
Working Capital	139,300	100	139,300
Total on Basis of Original Testimony			$2,746,181
Bridge in Process of Construction at Date of Oral Argument			22,500
Sewage Disposal Plant in Process of Construction at Date of Oral Argument			24,000
Total			$2,792,681

that the fair value of the property of respondent as a going concern is $2,792,681. . . ."

The substance of appellant's claim is that these figures are exclusively attributable to physical elements. Assuming that to be true, it does not follow that the Secretary failed to include proper allowance for going concern. *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 309. The value of appellant's property used in stockyard services is single in substance. *West* v. *C. & P. Tel. Co.,* 295 U. S. 662, 672. While it may be considered as made up of tangible and intangible elements, it is not necessarily to be appraised by adding to cost figures attributable to mere physical plant something to cover the value of the business. *Kennebec Water District* v. *Waterville,* 97 Me. 185, 220. Value depends upon use and is measured, or at least significantly indicated, by the profitableness of present and prospective service rendered at rates that are just and reasonable as between the owner of and those served by the property. *Cleveland &c. Railway Co.* v. *Backus,* 154 U. S. 439, 445. *National Waterworks Co.* v. *Kansas City,* 62 Fed. 853, 864-866. *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202. *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 165. *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 192. Cf. *Pub. Serv. Comm'n* v. *Utilities Co.,* 289 U. S. 130. It is elementary that value of a going concern may be less than, equal to, or more than, present cost of plant less depreciation plus necessary supplies and working capital. See *Galveston Elec Co.* v. *Galveston,* 258 U. S. 388, 396. *Los Angeles Gas Co.* v. *R. R. Comm'n, supra,* 313, 314. *Dayton P. & L. Co.* v. *Comm'n, ubi supra.* Appellant's plant without business, present or prospective, would be worth much less than the cost figures found by the Secretary to represent value. Appellant's claim, that the rate base includes nothing on account of going concern value, is without foundation in fact.

The considerations upon which appellant claimed to have established an amount to be added to rate base to cover going value may be summarily stated: (1) The sales charge is for the privilege of the market. The value of the market is not reflected in reproduction cost of structures. It is over and above value of or investment in plant. (2) Appellant has spent large sums and made gifts of money and land as a result of which large packers have their plants at Denver and buy on appellant's market. (3) Cattle of

various owners arriving at the Denver market by rail for the same market session from different shipping points may be sorted into uniform carloads to move to another destination on the through rate from point of shipment to point of destination. The privilege is not open at Chicago or any Missouri River market. (4) A high percentage of the stock received at appellant's yard is sold there; this percentage has progressively increased. (5) Volume, appraised at $10 per car, applied to the 35,000 cars annually received at the yard.

None of these considerations has much, if any, bearing on the ascertainment of going value or the application of the rule that it is to be taken into account in confiscation cases. That element is not separate from or necessarily in excess of reasonable cost figures attributable to the plant. The Secretary considered its location, the volume and flow of shipments, percentages of sales to receipts, privileges in transit, cost of service, past history, future prospects, and other pertinent facts. Appellant does not claim that its past operations clearly reflect excellence of service and low cost per unit in comparison with results attained by other stockyards, or that conditions affecting performance give dependable assurance of future growth and capacity to earn net returns at relatively low rates. See e. g. *McCardle* v. *Indianapolis Co., supra,* 413-415. Its evidence falls far short of condemning as arbitrary and confiscatory the Secretary's refusal to add a separate amount to his rate base to cover going concern value.

Yardage charges to traders. These are prescribed as reasonable maximum rates to cover sales for which, as above stated, appellant has made no charge. Its failure so to do is found by the Secretary and the lower court to be unreasonably and unjustly discriminatory, in that it does make charges for similar privileges it furnishes producers and others selling in its market. The prescribed charges apply to animals sold by producers or others to traders and by the latter resold or reweighed for sale at the yard. On cattle, calves and hogs they are 50 per cent of those charged producers, on sheep and goats 40 per cent, and on horses, mules and pure-bred bulls, 100 per cent. The Secretary estimates that if appellant exacts the prescribed charges to traders it will obtain revenue from that source of $10,960 per year, and he includes that amount in his calculation of reasonable return.

There is controversy between the parties as to space assigned to traders and details of service attributable to sales by them. But the evidence clearly shows that, as found by the Secretary and lower courts, appellant does provide them facilities and privileges similar to, though not precisely the same as, those furnished to others making sales in the market. These charges are not discriminatory as between producers; they directly bear but one charge. Assuming that the charge for selling by traders would operate to lessen prices obtainable by producers from them, no unjust discrimination results, for obviously charges for the two sales of the same animals reasonably may be more than that exacted for the first one. These rates are prescribed, and revenues obtainable from them are included by the Secretary in his estimate of appellant's income, to the end that it may not exact from producers and others selling at the yard charges sufficient to cover the part of its operating expenses that is fairly attributable to the sales made by traders. The statute denounces unjust discrimination and requires appellant as a public market to charge, and empowers the Secretary to prescribe, rates that are non-discriminatory. There is no ground for the appellant's suggestion to the effect that the order unlawfully invades its right as owner to manage the yard and control its business policy. Cf. *Interstate Comm. Comm.* v. *Chicago G. W. Ry.*, 209 U. S. 108, 118. *Nor. & West. Ry.* v. *West Virginia*, 236 U. S. 605, 609. *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 595, 596. *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 421.

Dues, donations and subscriptions. Appellant claims an allowance in operating expenses of $3000 to $4000 a year. The Secretary found that it has regularly made disbursements ranging between those figures to local charities, philanthropies, civic organizations, etc.[5] He held that only those of peculiar benefit to respon-

[5] There were over one hundred recipients of dues, donations and subscriptions during the five years ending with 1934. The contributions made in 1934 are fairly illustrative. They are listed below. Those in italics were made (in varying amounts) in each of the five years; those underscored were allowed by the Secretary.

Denver Community Chest, $1000; *Denver Chamber of Commerce*, $240; *U. S. Chamber of Commerce*, $50; Junior Chamber of Commerce, $15; *Tickets and Boxes—Stock Show*, $395.50; American Stockyards Association, $832.56; *Church Donations*, $115; Flowers, $4; United Appeal, $75; *Volunteers of America*, $10; Veteran Volunteer Firemen, $5; Firemen's Protective Association, $15; *Denver Traffic Club*, $18; *Denver Commercial Traffic Club*, $18;

dent's employees and patrons should be included; and on that basis allowed in estimated future operating expenses $325 a year. Appellant says that the exclusion leaves return about $1000 short of six and one-half per cent, that no contributions were made to charities which did not carry on in the stockyards area, and that nearly all other items were business expenses.

But decision here cannot be made to turn on an estimated margin relatively so small. Appellant's annual receipts and sales at the yard vary considerably. Operating expenses may be less or more per head than the estimates therefor. Property value may decline or advance. None of the expenditures in question is compulsory. Appellant may withhold dues, donations or subscriptions as it sees fit. It was not, and probably could not have been, proved that failure to respond would adversely affect its revenue. The Secretary is not required to prescribe rates so low as to be barely sufficient to withstand attack on the ground of confiscation, but is at liberty within limits that he may find to be just and reasonable to establish higher rates. *Banton* v. *Belt Line Ry., supra,* 422. *Dayton P. & L. Co.* v. *Comm'n, supra,* 308. *Columbus Gas Co.* v. *Comm'n,* 292 U. S. 398, 414. *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 317. Cf. *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 484. In view of the variable elements to which appellant's prospective income is subject, its control over the items in controversy, and their triviality, we find it unnecessary to decide whether appellant as of constitutional right is entitled to have any of them included in its future operating expenses.

Expenses of hearings under the Act. The Secretary found it reasonable to include in estimated operating costs some of the

---

I. C. C. Traffic Reports, $25.25; *Traffic Service Corp.,* $10; *Brand Inspectors —Christmas,* $70; *Denver Live Stock Exchange,* $95.53; *Denver Post,* $12; Tax Payers Review, $5; Policemen's Protective Association, $50; Lunches at Auction, $55; 4-H Club Luncheon, $34; Traffic Red Book, $8; Old Folks Home, $10; Christmas Seals, $1; Rescue Mission, $2.50; Chicago Drovers Journal Yearbook, $1; Church Messenger, $11; Joint Labor Day Committee, $10; Denver Tourists Bureau, $100; Wedding Gift, $250; Gents Driving & Riding Club, $10; Colorado Womens College, $100; International Vet. Congress, $25; Police & Sheriffs Association, $25; Federal Income Tax Service, $66; Western Legionnaire, $5; National Federation of Federal Employees, $11; American Legion, $5; Program—Holy Name Basket Ball, $5; Office Employees Hay Ride, etc., $3; Guldman Community Center, $2.50; President's Ball—Tickets, $18.

expenses incident to future hearings under the Act, suggested that they will be less than heretofore, and allowed $100 a month. The court below reached the same conclusion. Appellant does not attack this allowance as insufficient to cover expense on account of future hearings. Here, it complains that nothing is included "to amortize over a reasonable future period or at all the costs and expenses of the present litigation".

But we are not called on to decide that question. Appellant's bill challenges the Secretary's allowance, refers to expenses theretofore incurred in rate investigations and alleges that the allowance "is wholly inadequate to permit petitioner [appellant] either to reimburse itself for expenditures forced upon it by the Secretary or to meet probable reasonable expenditures for said purposes in the future, and that the . . . finding . . . is arbitrary . . .". At the trial the Secretary, without conceding materiality of the facts, stipulated that expense of the present proceeding from its commencement, about January 1, 1935, to the date of the order was $24,654.27 and that a reasonable estimate of the expense of litigation in the lower court was $15,785. Appellant requested the court to find that its average annual expense on account of hearings under the Act for the five-year period ending with 1934 was $8,786.88, and to find the facts stipulated by the Secretary and that its average annual expense on account of enforcement of the Act for the eleven-year period ending with 1934 was $6,216.

The burden was on appellant by direct allegations plainly to set forth the facts on which it intended at the trial to maintain that the rates are confiscatory. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447, and cases there cited. *N. O. Public Service* v. *New Orleans;* 281 U. S. 682, 686. *Beaumont, S. L. & W. Ry.* v. *U. S.,* 282 U. S. 74, 88-89. *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 255. Its complaint failed to disclose the claim it now makes. It is that for each of the five years following the effective date of the order, there should be added to estimated cost of operation about $8,000 to cover expenses of hearings before the Secretary and of litigation in the district court. Its request for finding was not sufficient to present the question. Probable expense of future hearings being in issue, the Secretary's stipulation as to actual cost of past hearings and probable expense of future liti-

gation cannot be regarded as consent to litigate the question of amortization not raised by the bill. As the issue was not appropriately presented below, appellant is not entitled to have it decided here.

Rate of return. Upon consideration of the testimony of the Secretary's economist and a local investment banker of high standing, who is also a stockholder and director of appellant, the Secretary and lower court found that six and one-half per cent per annum of the value of the property is a reasonable return. We need not restate the considerations to be taken into account in determining a reasonable rate of return.[6] Plainly the evidence is not sufficient to require or warrant a finding that in the immediate future a return of six and one-half per cent on the value of the property will be confiscatory.

The judgment of the District Court must be affirmed.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[6] Willcox v. Consolidated Gas Co., 212 U. S. 19. Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 692. Lindheimer v. Illinois Tel. Co., 292 U. S. 151. Dayton P. & L. Co. v. Comm'n, 292 U. S. 290, 311. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 72.